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IN THE SUPREME COURT OF THE UNITED STATES

NO. 424

WALKER WOOD, SECRETARY OF STATE, ET AL, **Appellants**

VS.

S. C. BROOM, **Appellee.**

BRIEF AND ARGUMENT FOR APPELLANTS.

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In The Supreme Court of The United States

WALKER WOOD, SECRETARY OF STATE, ET AL, **Appellants**

VS.

S. C. BROOM, **Appellee.**

STATEMENT OF THE CASE.

Plaintiff alleges that he is a qualified elector of Hinds County, Mississippi, and that he is qualified under the law and the Constitution of the United States to be a member of the House of Representatives.

The defendants are Walker Wood, Secretary of State, Greek L. Rice, Attorney General, M. S. Conner, Governor, W. W. Downing, Chancery Clerk of Hinds County, Bob Neely, Mrs. H. L. Moorehead and J. W. Vaughan, election commissioners of Hinds County, Mississippi.

Plaintiff brings his suit in his own right and in behalf of the citizens, qualified electors and tax payers of Hinds County, and the State of Mississippi.

Plaintiff further alleges that the Secretary of State is required to furnish to the election commissioners for each of the eighty-two counties of the state a sample official ballot, the form of which shall be followed in printing the ballots for the general election; that the election commission-

ers of Hinds County have practically the same duties in reference to the election in said county.

He further alleges that the Secretary of State is compensated for his services and each of the election commissioners for their services and the managers and clerks and other election officials for their services; that the cost of holding an election in Hinds County is approximately Five Hundred ($500.00) Dollars and in the State of Mississippi Fifty Thousand ($50,000.00) Dollars; that the expense of holding said elections are properly payable out of the general funds of the counties of the state and the expenses of such elections in Hinds County are payable from the general funds of the county; and that the compensation and expenses incurred by the Secretary of State are properly payable out of state funds; that the Chancery Clerk is required under the law to issue warrants payable out of the general fund.

Plaintiff further alleges that under the census of 1930 and under the re-apportionate act of Congress, representatives in Congress from the State of Mississippi were reduced from eight to seven and it became necessary for the State to pass an act redistricting the state; that House Bill 197, Legislature of 1932, a copy of which is made an exhibit to the bill, was enacted by the Legislature.

Appellant further alleges that this statute is in contravention of the Constitution of the United States and of the laws of the United States.

Plaintiff further alleges that the officers herein named as defendants are proposing to hold an election in the

State of Mississippi for the purpose of electing Congressmen from the various districts as set out in said House Bill Number 197 and that said election, if held, would be null and void on account of the unconstitutionality of said act.

Plaintiff then alleges "that a Federal question is involved in this suit and that the Legislative Act involved, redistricting the State of Mississippi, offends and violates Article 1, Section 4, of the Constitution of the United States and the Fourteenth Amendment of the Constitution of the United States and Section 3 of the Act of Congress, approved August 8th, 1911, which is now in full force and effect; and this bill of complaint calls for a construction of the Constitution of the United States and the Acts of Congress as relates to the redistricting of the State of Mississippi, as approved by the Acts of Congress of 1911."

Plaintiff further alleges that he presented a petition signed by fifty qualified electors of the State of Mississippi to the Secretary of State, requesting that his name be placed upon the ballot for the State at large and that his petition was denied. He further alleges that he filed a written request, signed by fifty qualified electors of Hinds County, to the election commissioners of Hinds County, requesting that his name be placed on the ticket used in the general election in Hinds County as a candidate for Congress from the state at large; that this petition was likewise denied.

With reference to equitable jurisdiction, plaintiff alleges: First, that he has no adequate and speedy remedy at law. Second, the multiplicity of suits; third, to prevent

the illegal expenditure of public funds; fourth, to protect the privileges, immunities and rights, guaranteed to this plaintiff and other citizens of the United States.

Plaintiff prays for an injunction, as follows:

First: Against the defendants, enjoining and restraining them from the expenditure of public funds of the State or Hinds County in an election to elect Congressmen from the districts.

Second, that the defendants, Walker Wood, and the election commissioners of Hinds County, be enjoined and required to accept and receive the petition of the plaintiff and to place his name on the sample official ballot to be used in the general election for Congressmen.

MOTION TO DISMISS ORIGINAL BILL.

Defendants, by the Attorney General of the State; have filed a motion to dismiss the original bill and assigns the following grounds, to-wit:

I. There is no equity on the face of the bill.

II. A court of equity is without jurisdiction in this case.

III. Under the facts stated in the original bill, plaintiff is not entitled, under the law, to have his name placed on the ballot as a candidate from the state at large.

IV. The decree of this court would be inefficacious.

I.

THERE IS NO EQUITY ON THE FACE OF THE BILL.

This proposition will be argued under two sub-heads, as follows:

(a) Plaintiff has an adequate remedy at law.

(b) There is no probability of a multiplicity of suits.

At the hearing of the cause on the original bill and motion to dismiss, the Court overruled the motion and granted a preliminary injunction.

Defendants then filed an answer as follows:

"Now come all of the defendants in the above styled cause by Greek L. Rice, Attorney General of the State of Mississippi, and J. A. Lauderdale, Assistant Attorney General, and for answer to the original bill now on file against them say:

I.

"Defendants admit each and every allegation of a material fact which is well pleaded in the original bill on file herein.

"Defendants do not admit the statements and conclusions of law made by plaintiffs in the original bill.

II.

"Defendants aver as follows:

"(1) That there is no equity on the face of the bill.

"(2) That under the facts stated in the bill and admitted in the answer this Court is without jurisdiction in this case.

"(3) That under the facts stated in the original bill and admitted in the answer, plaintiff is not entitled under the law to have his name placed on the ballot as a candidate from the State at large.

"(4) The decree of this Court would be inefficacious.

"(5) House Bill No. 197, Regular Session Legislature 1932, does not contravene any provision of the Federal Constitution.

III.

"Defendants now having answered the allegations of the original bill on file herein pray that said temporary injunction heretofore granted by this Court be dissolved, the original bill be dismissed, and the plaintiff taxed with all costs in this behalf expended."

The cause was then set down for hearing on the original bill and answer on motion for perpetual injunction. The Court granted the perpetual injunction, the decree being as follows, to wit:

"FINAL ORDER

"This cause this day came on for final hearing on Bill of Complaint and answer filed by all of the defendants and by consent of all the parties, the case is set down for final hearing and it appearing to the Court composed of Circuit Judge Rufus E. Foster, and District Judges, E. R.

Holmes and Ben C. Dawkins, heard the cause on August 5, 1932, on motion of the complainant, Stewart C. Broom, for a preliminary injunction herein, according to the prayer and amendment thereto of his bill of complaint herein; and upon defendants' motion to dismiss this suit for causes therein set out, and upon the whole case it appearing that the answer filed by the defendants admits the facts set out in the Bill of Complaint, and the Court having heard the argument of the case, considered the judgment roll herein, and being advised sufficiently:

"IT IS ORDERED, ADJUDGED AND DECREED, a majority of the Court concurring, that the preliminary injunction heretofore granted be and the same is hereby continued and made permanent.

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, a majority of the Court concurring, that the prayer of the Bill and the amendment thereto be and the same is hereby granted, and the defendants, and each of them, are restrained and enjoined from doing and performing any and all of the acts contained in the prayer and the amendment thereto.

"It is further ORDERED, ADJUDGED and DECREED by the Court that Walker Wood, the Secretary of State for the State of Mississippi, be, and he is hereby restrained and enjoined from receiving the returns and certifying the nominees for representatives in Congress from Districts in the State of Mississippi as set out and contained in House Bill 197, known as the Congressional Redistricting Act of the Legislature of the State of Mississippi, and he is restrained and enjoined

from certifying the names of any persons elected representatives in Congress from the State of Mississippi, except those who are elected from the State at large.

"It is further ORDERED, ADJUDGED and

DECREED, that the election commissioners named in the Bill of Complaint of Hinds County, Mississippi, be and they are hereby restrained and enjoined from receiving any sample ballots from the Secretary of State for the State of Mississippi, containing the names of candidates for representatives in Congress by Districts as set out in House Bill 197 of the Acts of Legislature of the State of Mississippi, 1932 Session, known as the Congressional Redistricting Bill for the State of Mississippi, and it is further ordered that said election commissioners be and they are hereby restrained and enjoined from certifying the returns of the election of names of any persons to the Secretary of State of Mississippi for representatives in Congress, except those persons who are elected from the State at large.

"It is further ORDERED, ADJUDGED and DECREED that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from preparing and sending out sample ballots to be used for the election for representatives in Congress for the State of Mississippi, except for an election for representatives in Congress from the State at large.

"It is further ORDERED, ADJUDGED and DECREED that the Secretary of State of the State of Mississippi be and he is hereby restrained and enjoined from certifying to the Governor of the State of Mississippi any persons elected as

representatives in Congress in the State of Mississippi, except those persons elected from the State at large.

"It is further ORDERED, ADJUDGED and DECREED that House Bill 197, known as the Congressional Redistricting Bill for the State of Mississippi at its 1932 session, be and the same is hereby declared unconstitutional and illegal, and that no valid election can be held for representatives in Congress thereunder.

"It is ORDERED, ADJUDGED and DECREED by the Court that the preliminary injunction hereinbefore granted, be and it is now made perpetual, but that no costs be adjudged against the defendants.

"ORDERED and ADJUDGED this the 16th day of August, 1932.

RUFUS E. FOSTER,
U. S. Circuit Judge.
BEN C. DAWKINS,
U. S. District Judge."

It will be interesting to note the variance in the relief prayed for and in the relief granted by the Court.

The finding of facts and conclusions of law as made by the Court are as follows, to-wit:

"This is a bill brought by Stewart C. Broom, a citizen of the United States, domiciled in Mississippi, against various state officers, praying for interlocutory and final injunctions to prohibit them from acting under the provisions of House Bill No. 197 of the 1932 Acts of the Legislature of Mississippi, known as the Congressional Re-

districting Act, on the ground that it violates the provisions of Art. 1, Sec.. 4 of the Constitution of the United States and Sec. 3 of the Act of Congress of August 8, 1911, (Title 2 U. S. C. A. Sec. 3). The defendants, appearing through the Attorney General of Mississippi admitted all the allegations of fact in the bill but objected to the jurisdiction of the court on the grounds that sufficient jurisdictional amount was not involved and that the cause was not cognizable in equity as no rights of property were invaded. The plea to the jurisdiction was overruled and an interlocutory injunction issued on bond. On final hearing the injunction was made permanent.

"STATEMENT OF FACTS.

"The undisputed material facts are these. Based on the cesus enumeration of 1910, Mississippi was allotted eight representatives in Congress. Under the provisions of Section 22, Act of June 18, 1929, 46 Stat. 26, the allotment was reduced to seven.

"The act of the Mississippi Legislature complained of, House Bill No. 197, Regular Session 1932, divides the State of Mississippi into seven congressional districts. The number of inhabitants in each district is approximately as follows: The first district, 241,000; second district, 219,000; third district, 420,000; fourth district, 184,000; fifth district, 244,000; sixth district, 284,000; seventh district, 414,000.

"According to the 1930 census, Mississippi has 2,009,821 inhabitants. It would be practicable to divide the state into seven districts having compact and contiguous territory with each dis-

trict having approximately the same number of inhabitants.

"CONCLUSIONS OF LAW.

"The right to vote for a Representative in Congress is a right guaranteed by the Constitution of the United States. *U. S. vs. Mosley*, 238 U. S. 383. Said right to vote implies the right to vote in a legal election. Sec. 3 of the Act of August 8, 1911, requires each state to be divided into the number of districts equal to the number of representatives to which the state may be entitled, said districts to be composed of contiguous and compact territory, and to have as nearly as practicable the same number of inhabitants. The act is mandatory and must be followed by the states in fixing Congressional districts. The Mississippi act is clearly violative of the said act of Congress and illegal and void. Any election for representatives based upon the redistricting of the state under the provisions of said act will therefore be illegal and deprive the voters of the state of a right guaranteed by the Constitution. The plaintiff has no remedy at law at all. An injunction is the proper remedy in the premises.

"Under the provisions of Sec. 24, Subdivision 14, Judicial Code (28 U. S. C. A. 41) the District Court has jurisdiction in equity, regardless of the amount involved or the violation of any right of property, to prevent invasion of any right of a citizen guaranteed by the Constitution."

The section of the Constitution of the United States in controversy is Article I, Section IV, Clause 1, which reads as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of choosing Senators."

The Act of Congress in controversy is the Act of August 8, 1911, Section 5; Section 3 of 37 Stat. 14. Title 2, Section 3, U. S. C. A., is as follows:

> "In each state entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative. (Aug. 8, 1911, c. 5, Sec. 3, 37 Stat. 14)."

The points raised by the motion to dismiss the bill, the points made by the answer and the points raised by the assignments of error are all the same and are covered by the statement of points to be relied upon for a reversal of this case, and for the sake of brevity will be argued together.

THE STATEMENT OF POINTS TO BE RELIED UPON FOR A REVERSAL OF THIS CASE AS FILED BY APPELLANTS IS AS FOLLOWS:

> "The Court below erred in overruling the motion to dismiss the original bill, in granting a

preliminary injunction and in granting the perpetual injunction for the following reasons, to-wit:

I.

"There is no equity on the face of the bill

"(a) Because plaintiff had a plain, speedy, complete and adequate remedy at law.

"(b) Because there is no probability of a multiplicity of suits.

II.

"A court of equity is without jurisdiction in this cause

"(a) Because the amount in controversy does not exceed $3,000.00.

"(b) Because a Federal Court of equity has no jurisdiction to prevent the deprivation of a political right.

III.

"Under the facts stated in the bill, plaintiff is not entitled to have his name placed on the ballot as a candidate for Congress from the state at large.

IV.

"The decree of this Court would be inefficacious

"(a) Because the election could be held without the expenditure of public funds.

"(b) Because the Governor must approve

the sample ballot. No injunction is prayed for against him.

"(c) Because an injunction against the election commissioners of Hinds County would not be effective.

"(d) Because a decree of the Court could not be enforced.

"(e) Because Congress is the judge of the election of its own members, and a decree of this Court would not be controlling on Congress.

"(f) The power to prescribe the time, place and manner of electing members of Congress is by the Constitution of the United States vested in the State Legislature subject to the power of Congress to make or alter such state regulations, and the courts have no jurisdiction or power in reference thereto.

V.

"House Bill No. 197, Regular Session of the Legislature of 1932 does not contravene any provision of the Constitution of the United States or the laws thereof."

I (a)

ADEQUATE REMEDY AT LAW.

In 1924 the primary election laws of the State of Texas denied the right to vote to negroes. One Nixon, a negro, presented himself at a primary election, held in Texas on July 26th, 1924, and demanded the right to vote. This right was denied to him by the managers of the election. Nixon sued in the District Court of the United States and

from an adverse judgment obtained a writ of error, carrying said cause to the Supreme Court of the United States. In the case of *Nixon v. Herndon*, 273 U. S. 536, 71 L. Ed. 759, the Supreme Court of the United States held as follows:

> "The objection that the subject matter of the suit is political is a little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White;* 2 Ld. Raym. 938, 92 Eng. Reprint, 126, 1 Eng. Rul. Cas. 521, 3 Ld. Raym. 320, 92 Eng. Reprint, 710 and has been recognized by this court, *Wiley v. Sinkler*, 179 U. S. 58, 64, 65 L. Ed. 84, 88, 89, 21 Sup. Ct. Rep. 17; *Giles v. Harris*, 189 U. S. 475, 485, 47 L. ed. 909, 911, 23 Sup. Ct. Rep. 639. See also Judicial Code, par. 24 (11), (12), (14). Act of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1092. Comp. Stat. par. 991, 4 Fed. Stat. Anno. 2nd ed. p. 840. If the defendants' conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result."

While the question of the right to sue was not directly raised in the case of *Nixon vs. Condon*, 76 L. ed., advance Sheet No. 12, page 629, not yet officially reported, the Supreme Court of the United States in that case held that where a person was illegally denied the right to vote he had the right to sue the election officers for damages. This affords such person an adequate remedy at law.

Giles vs. Harris, 189 U. S. 475, 47 L. ed. 909: The facts in this case are stated by Justice Holmes, who rendered an opinion, as follows:

> "This is a bill in equity, brought by a colored man on behalf of himself and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama, similarly situated and circumstanced as himself against the board of registrars of that county. The prayer of the bill is in substance that the defendants may be required to enroll upon the voting list the name of the plaintiff and of all other qualified members of his race who applied for registration before August 1st, 1902, and were refused, and that certain sections of the Constitution of Alabama, viz.: 180, 181, 183, 184, 185, 186, 187 and 188 of Article 8, may be declared contrary to the 14th and 15th Amendments to the Constitution of the United States, and void.
>
> "The allegations of the bill may be summed up as follows: The plaintiff is subject to none of the disqualifications set forth in the Constitution of Alabama and is entitled to vote, entitled, as the bill plainly means, under the Constitution as it is. He applied in March, 1902, for registration as a voter, and was refused arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered. The same thing was done all over the state. Under section 187, of article 8, of the Alabama Constitution, persons registered before January 1st, 1903, remain electors for life, unless they become disqualified by certain crimes, etc., while after that date severer tests come into play which would exclude, perhaps a large part of the

black race. Therefore, by the refusal the plaintiff and the other negroes excluded were deprived, not only of their vote at an election, which has taken place since the bill was filed, but of the permanent advantage incident to registration before 1903. The white men generally are registered for good under the easy test, and the black men are likely to be kept out in the future as in the past. This refusal to register the blacks was part of a general scheme to disfranchise them, to which the defendants and the state itself, according to the bill, were parties. The defendants accepted their office for the purpose of carrying out the scheme. The part taken by the state, that is by the white population which framed the Constitution, consisted in shaping that instrument so as to give opportunity and effect to the wholesale fraud which has been practiced. * * * * *

"Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the appeal or the bill on that ground, because to be enabled to cast a vote in that election is not, as in *Mills vs. Green*, 159 U. S. 651, 657, 40 L ed. 293, 295 16 Sup. Ct. Rep. 132, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903. * * * * We assume further, for the purpose of decision, that section 1979 extends to a deprivation of rights under color of a state constitution, although it might be argued with

some force that the enumeration of 'statute, ordinance, regulation, custom, or usage' purposely is confined to inferior sources of law. On these assumptions we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill. Therefore, we are not prepared to say that the decree should be affirmed on the ground that the subject matter is wholly beyond the jurisdiction of the circuit court. *Smith v. McKay*, 161 U. S. 355, 358, 359, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490. * * * *

"It seems to us impossible to grant the equitable relief which is asked. *It will be observed, in the first place, that the language of Sec.* 1979 *does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject matter for that kind of relief. The words are, 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress'. They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. Green v. Mills,* 30 *L. R. A.* 90, 16 *C. C. A.* 516, 25 *U. S. App.* 383, 69 *Fed.* 852. But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seem to us to dispose of the case. The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not

maintain a bill for a mere declaration in the air. He does not try to do so, but askes to be registered as a party qualified under the void instrument. If, then, we accept the conclusion, which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists. If a white man came here on the same general allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied, because we think that in the future the particular plaintiff is likely to try to overthrow the scheme. If we accept the plaintiff's allegations for the purpose of his case, he cannot complain. It is impossible simply to shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question to the future. If we have an opinion that the bill is right on its face, or if we are undecided, we are not at liberty to assume it to be wrong for the purpose of decision. It seems to us that unless we are prepared to say that it is wrong, that all its principal allegations are immaterial, and that the registration plan of the Alabama Constitution is valid, we cannot order the plaintiff's name to be registered. It is not an answer to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. In the first place, there is no probability that any way now is open by which more than a few could be registered, but, if all could be, the difficulty would not be overcome. If the sections of the Constitution concerning registration were illegal in their inception, it would

be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object could be secured.

"The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in Sec. 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a state, although the state is not and could not be made a party to the bill. *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 1 Sup. Ct. Rep. 504. The circuit court has no constitutional power to control its action by any direct means. And if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the

plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them, or by the legislative and political department of the government of the United States."

Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, the court stated the facts and held as follows:

"This action is brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States. The complaint, by alleging that the plaintiff was at the time, under the Constitution and the Laws of the State of South Carolina, and the Constitution and Laws of the United States, a duly qualified elector of the State, shows that the action is brought under the Constitution and laws of the United States.

"The damages are laid at the sum of $2,500.00. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the Circuit Court. *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Scott v. Donald*, 165 U. S. 58, 89, 41 L. ed. 632, 638, 17 Sup. Ct. Rep. 265; *Vance v. W. A. Vandercook Co.*, 170 U. S. 468, 472, 42 L. ed. 1111, 1112, 18 Sup. Ct. Rep. 674; *North American Transp. & Trading Co. v. Morrison*, 178, U. S. 262, 267, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869.

> "The circuit court therefore clearly had jurisdiction of this action and we are brought to the consideration of the other objections presented by the demurrer to the complaint."

Myers v. Anderson, 238 U. S. 367, 59 L. ed. 1349: In this case plaintiff brought suit for damages against election officials for denying the right of suffrage to negro citizens. The court held that the invalidity of the provisions of a statute prescribing qualifications for voters at an election did not relieve the election officers, appointed under that statute, from liability for denying the right to register and vote at such elction to negro citizens, contrary to the United States Constitution, on account of race, color, or previous condition of servitude.

In the case of *Swafford vs. Templeton,* 185 U. S. 487, this Court held that an action to recover damages from State election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives at a national election held in the district where he resided is one arising under the Constitution of the United States of which a circuit court of the United States has jurisdiction. Plaintiff brought the action in this case to recover damages because he contended that the election officers had unlawfully denied him the right to vote in an election held for the purpose of electing Representatives in Congress from the State of Tennesse.

It therefore appears clearly from the decisions announced in the Supreme Court in the above cases that where a person is denied the right to vote that his remedy is by an action at law in the Federal Courts.

It may be contended that in this case plaintiff has not yet been denied his political rights and therefore he has the right to enjoin to prevent the deprivation of the right, however, this contention cannot be maintained, because if his rights are denied him, he has an adequate remedy at law.

This question is settled by the decision of the court in *Giles v. Harris*, supra, wherein the court stated that the main purpose of the bill was to secure to the plaintiff the rights of citizenship for the future, but the court held that equity did not have jurisdiction, because the plaintiff had the adequate remedy at law.

I. (b)

MULTIPLICITY OF SUITS.

In the Court below plaintiff did not argue that there was any probability of a multiplicity of suits in this case. Inasmuch as I will not have an opportunity of replying to the brief filed by appellee herein, I submit the following:

Plaintiff alleges "that to permit the defendants to deny to the thousands of inhabitants of the said district the rights and privileges guaranteed to them by the Constitution and the Laws of the United States would result in a multiplicity of law suits."

There is no allegation that any other person has been denied any right or privilege, either political or civil claimed by himself. It is true that plaintiff alleges that this suit is brought in his own behalf and in behalf of all other

citizens and tax payers of the state. This allegation is not sufficient to show that a multiplicity of suits is probable.

In the case of *Giles v. Harris*, supra, it is shown that in that case the plaintiff brought his suit in his own behalf and in behalf of five thousand other negroes who had been denied the same rights that had been denied to him. In that case the court held he had an adequate remedy at law, but in the case at bar, it is not alleged that any other person had been denied any right by any of the defendants named in said bill.

The law is well settled that a mere probability, or a mere possibility of a multiplicity of suits is not sufficient to give a Federal Court equity jurisdiction.

In the case of *Rogers v. Matthews*, 76 L. ed., Advance sheet No. 7, Page 271, the court held as follows:

> "Appellees' bill of complaint does not state a case within the jurisdiction of equity to avoid multiplicity of suits. As to each appellee a single suit at law brought to recover the tax will determine its constitutionality and no facts are alleged showing that more than one suit will be necessary for that purpose. See *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, 285, 286, 53 L. ed. 796, 799, 800, 29 S. Ct. 426; *Dalton Adding Mach. Co. v. State Corp. Commission*, 236 U. S. 689, 700, 701, 59 L. ed. 797, 798, 35 S. Ct. 480.
>
> "But it is said that since each appellee must pay the tax to avoid penalties and criminal

prosecution, all must maintain suits for the recovery of the tax unconstitutionally exacted in order to protect their Federal rights, and that to avoid the necessity of the many suits, equity may draw to itself the determination of the issue necessarily involved in all the suits at law.

"In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party are not necessarily identical. *St. Louis, I. M. & S. R. Co. v. McKnight* 244 U. S. 368, 375, 61 L. ed. 1200, 1205, 37 S. Ct. 611; *Kelly v. Gill*, 245 U. S. 116, 120, 62 L. ed. 185, 188, 38 S. Ct. 38, 40 Am. Bank Rep. 421; *Francis v. Flinn*, 118 U. S. 385, 30 L. ed. 165, 6 S. Ct. 1148; *Scott v. Donald*, 165, U. S. 107, 115, 41 L. ed. 648, 654, 17 S. Ct. 262; *Hale v. Allison*, 188 U. S. 56, 77 et. seq., 47 L. ed. 380, 392, 23 S. Ct. 244; and see Pomeroy, Eq. Jur. 4th ed. 1918, Sec. 251, 251½, 255, 259, 268."

The case of *Boise Artesian Hot and Cold Water Company v. Boise City*, 213 U. S. 276, was a suit to enjoin the collection of a privilege tax in the sum of $300.00, to be paid the first day of each and every month and the bill also alleged that the municipal authorities were threatening to tear up or destroy the pipes of the company in the streets of the municipality. The Court held as follows:

"The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multi-

plicity of suits, and cast a cloud upon the company's title to its franchise.

"But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city, and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties. * * * * *

"Nor do we think there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only had been brought and that by direction of the city council. It remains pending, and when it reached judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetition of suits by the same person against the plaintiff for causes of action arising out of the same fact and legal principles, a court of equity ought not to interfere upon that ground, unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single

action with an honest purpose to settle the rights of the parties. 1 Pom. Eq. Jur. 3d. ed., Sec. 254."

In *Dalton Adding Machine Co. v. State Corporation Commission*, 236 U. S. 698, the Court held as follows:

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of appellant's claim of immunity and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question of whether the action of the commission is or is not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat. Sec. 720, *Brentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general principle is that it is not for the court to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank vs. Allbright*, 208 U. S. 548, 553, 52 L. ed. 614, 616, 23 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Co. v. Koene*, 188 U. S. 681, 690, 47 L. ed. 651, 656, 23 Sup. Ct. Rep. 452."

In the case of *Cave v. Randolph*, 287 Fed. 989, the Federal Court held as follows:

> "Nor does the possibility of the multiplicity of arrests and trials in such cases pending a final decision of the question avail to bring the issue within the jurisdiction of equity."

In the case of *St. Louis, I. M. & S. R. Co. v. McKnight*, 244 U. S. 368, the railroad company sought to enjoin certain shippers and travelers from suing the railroad company on account of a controversy over the rates; that is, the railroad company had charged a rate in excess of that claimed to be due by the shippers and travelers. A great number of these claims were involved. The Court held as follows:

> "The only common issue between the railroad company and the several shippers and travelers (namely whether the rates promulgated by the railroad commission were confiscatory) had been settled by the decision of this court. In no other respect have shippers and travelers a common interest. The claims of each present a separate controversy unconnected with that of any of the others. This is obviously true as to all issues of fact, which will arise in considering their several claims."

In the case of *Francis v. Flinn*, 118. U. S. 389, the plaintiff sought the aid of a court of equity to enjoin the officers and certain citizens of Louisiana from interfering with its piloting business. The Court held as follows:

> "The whole gist of the complaint is that the defendants do not treat the plaintiff as having the

right to use his vessel as a pilot boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongfully interfered with by the defendants, or others, he can prosecute them for this wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same means of redress which are afforded to every citizen whose rights are invaded and obstructed. If the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.

"We think the court below should have sustained the demurrer of the defendants for want of equity in the bill."

In *Dows v. Chicago*, 78 U. S. 112, a bill for injunction was filed by Dows, the owner of stock in the Union National Bank, in which the validity of tax on national bank stock was questioned. Of course, there were not only a number of stockholders in this particular bank interested, but also all stockholders in the national banks of the state of Illinois were interested in said suit. However, the court held that

the Federal Court did not have jurisdiction to restrain the collection of the tax in this case, the court holding as follows:

> "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

This is an old case and one of the leading cases on the subject, and has been followed and cited in almost every case of importance involving the jurisdiction of a court of equity since said time.

II.

A court of equity is without jurisdiction in this case.

This proposition will be argued under the following headings to-wit:

(a). The amount in controversy does not exceed Three Thousand (3,000.00) Dollars.

(b). A court of equity has no jurisdiction under the facts alleged in this bill.

II. (a).

AMOUNT IN CONTROVERSY.

In the event this Court holds that a Federal Equity

Court has jurisdiction of this case under the provisions of sub-section 14, Section 24, Judicial Code, then it is unnecessary for plaintiff to allege or prove that the amount in controversy exceeded the sum of $3,000.00. Plaintiff in the Court below abandoned their right to bring this suit on the ground that they were enjoining the illegal expenditure of public funds. If jurisdiction is had on this ground, then the amount in controversy must exceed $3,000.00.

I have been unable to find any opinion of a Federal Court, holding that a Federal Court did or did not have jurisdiction to enjoin the illegal expenditure of public funds. However, assuming that in proper cases a Federal equity court would have this power, it is clear that under the allegations of this bill, the jurisdictional facts are not sufficiently set out.

The primary purpose of this bill is to secure an order of this court so that he may be a candidate from the state at large. In order to secure jurisdiction for this purpose the plaintiff alleges that to hold an election from the districts would be void and that the expenditure of funds for such purpose would be illegal.

There are a number of federal cases wherein the jurisdiction of the Federal Courts to enjoin the collection of a tax under a statute which is unconstitutional is upheld. This class of cases would be analogous to the case at bar. In all of said cases the court held that the amount in controversy must exceed the sum of Three Thousand ($3,000.00) Dollars and that in estimating this amount, the taxes to be paid for one year by one person could be con-

sidered. In other words, in the case at bar, the plaintiff would have to show that his damage, by reason of the illegal expenditure of public funds for the holding of said election, would exceed $3,000.00. There is no such allegation and no facts alleged from which such allegation might be inferred. The jurisdictional fact is therefore not alleged.

If jurisdiction is had in this case on the ground that the court has the right to enjoin the illegal expenditure of public funds, then this is a property right, and the jurisdiction, if any, must be found in Section 24, Judicial Code, as amended, sub-section 1 (U. S. C. A. title 28, Section 41, sub-section 1).

It is clear that plaintiff is attempting to get jurisdiction by virtue of the provisions of sub-section 14 of said section, but if he is depending on the illegal expenditure of public funds for jurisdiction, then the jurisdiction is fixed in said sub-section 1 and the amount in controversy must exceed the sum of $3,000.00.

In *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, the telegraph company sought to enjoin the collection of certain taxes. It appears from the reported case that the taxes against the telegraph company were assessed in each county. The court held that the telegraph company could not combine the taxes in the separate counties, and unless the tax in one county was more that the jurisdictional amount, then the suit must fail.

See also *Walter v. Northeastern R. R. Co.*, 147 U. S. 370.

In *Holt v. Indiana Manufcaturing Co.*, 176 U. S. 68, it is held that a suit to restrain the collection of taxes not exceeding $2,000.00 in amount, though arising under the constitution or laws of the United States, is not within the jurisdiction of the Circuit Court of the United States.

This case further holds that future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute.

In *Citizens Bank of Louisiana v. Cannon*, 164 U. S. 319, the court held that in a suit by a bank to enjoin the collection of taxes for certain years on property claimed to be exempt, the amount of the tax being insufficient to give jurisdiction, the fact that the value of the exemption during the continuance of the charter of the bank will exceed the jurisdictional amount, will not give jurisdiction.

In the case of *Cole v. Norborne Land Drainage District*, 207 U. S. 45, the Supreme Court held that in a suit to enjoin the collection of a tax for drainage benefit on the ground of the unconstitutionality of the statute that the assessments against each of them was less than the jurisdictional amount and the suit could not be sustained.

The tax for the current year and not for future years controls in a case to enjoin the collection of a tax.

See *Citizens Bank v. Cannon*, 164 U. S. 319.

In *Turner v. Jackson Lumber Company*, 218 U. S. 685, the Supreme Court held that the amount in controversy was the amount of taxes in dispute, and that unless this was

more than the jurisdictional amount, the court would not have jurisdiction.

In *Lion Building Company v. Karatz*, 262 U. S. 77, the Supreme Court held that a plaintiff who sued on his own behalf and on behalf of other persons similarly situated, that the amount in controversy was the amount claimed by each plaitiff, and not the aggregate amount.

In *Scott v. Frazier*, 253 U. S. 243, the Supreme Court held:

> "There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000.00. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional amount as to each plaintiff. *Wheless v. St. Louis*, 180 U. S. 379; *Rogers v. Hennepin Co.*, 239 U. S. 62.
>
> "In cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court cannot be maintained where such separate interests are below the jurisdictional amount.
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> Ex Parte Baltimore, etc. R. Co., 106 U. S. 5;
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> *Adams v. Crittenden*, 106 U. S. 576;
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> *Schewd v. Smith*, 106 U. S. 188;
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> *Elgin v. Marshall*, 106 U. S. 578;

Ogden v. Armstrong, 168 U. S. 224;

Chamberlain v. Browning, 177 U. S. 605."

I concede that in the event jurisdiction can be had, by virtue of the provisions of sub-section 14, then it is not necessary to allege that the amount in controversy does exceed $3,000.00 however, as hereinbefore stated, when a property right is involved, then the jurisdictional amount must appear. It is clear from the allegation of the bill that a property right is involved when the right to enjoin the expenditure of funds is involved.

II. (b).

A COURT OF EQUITY HAS NO JURISDICTION UNDER THE FACTS ALLEGED IN THIS BILL.

Judicial Code, Section 267, Section 384 U. S. C. A., provides as follows:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy at law may be had."

In the Federal Courts the distinction between law and equity is maintained, and remedies afforded by law and equity are separately pursued.

Gibson vs. Schouteau, 13 Wall, 92;

Krippendorf vs. Hyde, 110 U. S. 778;

Carter vs. Ruddy, 166 U. S. 493.

"To maintain a suit in equity when a party has a plain and complete remedy at law is to de-

prive defendant of his constitutional right for a trial by a jury."

Hipp vs. Babin, 19 Howard 271;

Parker vs. Winnipiseogee Co., 2 Black 545;

Insurance Co. vs. Bailey, 13 Wall 616;

Oelrichs vs. Spain, 15 Wall 211;

Granchute vs. Winnegar, 15 Wall 355;

Lewis vs. Cox, 23 Wall 466;

Whitehead vs. Shattuck, 138 U. S. 146;

Scott vs. Neely, 140 U. S. 106;

Swan Land & Cattle Co. vs. Frank, 148 U. S. 603;

Cates vs. Allen, 149 U. S. 451;

Ex Parte Young, 209 U. S. 123.

In the case of *Henrietta Mills vs. Rutherford County*, 281 U. S. 121; 74 L. ed. 737, the Court held as follows:

"Section 16 of the Judiciary Act of 1789 (1 Stat. at L. 82, Chap. 20) provided 'that suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law.'

"This explicit prohibition, continued in Section 723 of the Revised Statutes and Section 267 of the Judicial Code (U. S. C. A. title 28, Section 384), has clear application to proceedings to enjoin the collection of taxes upon the ground that they are illegal or unconstitutional. It must appear that the enforcement of the tax would cause irreparable injury or that there are other special circumstances bringing the case under some rec-

ognized head of equity jurisdiction, before the aid of a Federal court can be invoked. The mere fact that the validity of the tax may be tested more conveniently by a bill in equity than by an an action at law does not justify resort to the former."

In the case of *Ex Parte Sawyer*, 124 U. S. 200, 31 L. ed. 402, text page 409, the Court held as follows:

> "The reasons which preclude a court of equity from interfering with the appointment or removal of public officers of the government from which the court derives its authority apply with increased force when the court is a court of the United States and the officers in question are officers of a state. If a person claiming to be such an officer is, by the judgment of a court of the state, either in appellate proceedings or upon a mandamus or quo warranto, denied any right secured to him by the Constitution of the United States, he can obtain relief by a writ of error from this court."

In the case of *McConihay vs. Wright*, 121 U. S. 201, 30 L. ed. 932, the Supreme Court of the United States held as follows:

> "The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted unless subsequently changed by Act of Congress."

Judicial Act of 1789 is Section 24, Judicial Code, and Section 41, U. S. C. A.

Giles vs. Harris, 189 U. S. 475.

Said sub-section 14 (a) provides that the district courts shall have original jurisdiction "of all suits at law, or in equity authorized by law, to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States, providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

This section gives the Federal Courts jurisdiction *"to redress the deprivation"* of rights.

The bill in this case is filed to prevent the deprivation of a right or rights and not to redress the deprivation of a right or rights.

Black's Law Dictionary defines the word "redress" as follows: "Receiving satisfaction for an injury sustained."

Ballentine's Law Dictionary, as follows: "Remedy, Indemnity, Reparation."

Bouvier's Law Dictionary, as follows: "The act of receiving satisfaction."

It is therefore clear that plaintiff is not seeking *"redress"* for the deprivation of a right, but that he is seeking to *prevent* a deprivation of a right.

In the case of *Holt v. Indiana Manufacturing Co.*, 176 U. S., page 68, 44 L. ed., page 374, the Supreme Court of the United States holds as follows:

> "Similar jurisdiction is conferred upon district courts by the 12th clause of Section 563 of the Revised Statutes.
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> "Section 1979 of the Revised Statutes provides: 'Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
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> "All these provisions were brought forward from the act of April 20, 1871, entitled 'An Act To Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes.' 17 Stat. at L. 13, Chap. 22.
>
> "Assuming that they are still in force, it is sufficient to say that they refer to civil rights only, and are inapplicable here."

The statute in question gives the court equity jurisdiction to prevent the deprivation of civil rights. The Court has attempted to prevent the deprivation of political rights. Political and civil rights have been defined by the courts as follows:

POLITICAL RIGHTS DEFINED.

"A 'political right is a right exercisable in the administration of government.' *State ex rel. Attorney General v. Huston*, 113 Pac. 190, 198, 27 Okl. 606, 34 L. R. A. (N. S.) 380; *People ex rel. Attorney General v. Tool*, 86 Pac. 224, 228, 35 Colo. 225, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198 (quoting And. Law Dict. 905.)

"'Political rights' consist in the power to participate directly or indirectly in the establishment or administration of government such as the right of citizenship, suffrage, etc. *Friendly v. Olcott*, 123 Pac. 53, 56, 61 Or. 580.

"'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers and of being elected. These are the political rights which the humblest citizen possesses. *Winnett v. Adams*, 99 N. W. 681, 684, 71 Neb. 817 (quoting 2 Bouv. Law Dict.)

"The right to become the nominee of a political party for public office, whether national or state, and as such nominee to receive the votes of the qualified electors voting to fill such office, is a purely 'political right' as contradistinguished from a civil or property right. 'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers, and of being elected. These are the political rights which the humblest citizen possesses. *A court of equity has no juris-*

diction to enjoin officers of a state, acting under a state statute from issuing a certificate of nomination to a candidate for representative in Congress; the right involved being purely political, as distinguished from a civil or property right, to which alone the jurisdiction of equity extends. Anthony v. Burrow, 129 Fed. 783, 784, 789, (quoting and adopting definition in Re Sawyer, 8 Sup. Ct. 482, 124 U. S. 200, 31 L. ed. 402).

"Under Const. Art. 6, Par. 3, which provides that persons convicted of infamous crimes, unless restored to their civil rights, shall be excluded from the elective franchise, an information charging that accused, in registering to vote, falsely swore that he had not lost his civil rights by being convicted of an infamous crime, whereas he had been convicted in another state of the infamous crime of breaking jail before conviction, does not state an offense; the right to vote being 'political' and not 'civil'. *State v. Collins*, 124 Pac. 903, 904, 69 Wash. 268.

"A 'political right' is defined by Anderson to be a right exercisable in the administration of government, and Bouvier says: 'Political rights consist in the power to participate directly or indirectly in the establishment or management of government'. *People v. Barrett*, 67 N. E. 742, 743, 203, Ill. 99, 96 Am. St. Rep. 296.

"Political rights are those which may be exercised in the formation or administration of the government; the term 'rights' as used in this definition, being synonymous with 'power.' *People v. Morgan*, 90 Ill. 558, 563.

"Political rights consist in the power to participate directly or indirectly in the establish

ment or management of government. The elective franchise and the right to hold public office constitute the principal political rights of the citizens of the several states. *People v. Washington*, 36 Cal. 658, 662.

"A political right is a right exercisable in the administration of the government. It is the power to participate directly or indirectly in the establishment or management of the government. Such rights are fixed by the Constitution. A court of equity has no jurisdiction to enjoin issuing notice of an election, and certifying the candidate's thereat, under a law alleged to be unconstitutional since that is a matter involving political and not civil rights. *Fletcher v. Tuttle*, 37 N. E. 683, 686, 151 Ill. 41, 25 L. R. A. 143, 42 Am. St. Rep. 220.

CIVIL RIGHTS DEFINED

"A 'civil right' is a right accorded to every member of a district, community, or nation.' *Winnett v. Adams*, 99 N. W. 681, 684, 71 Neb. 817 (quoting Anderson Law Dict.)

"' Civil rights' are such as belong to any citizen, or, in a wider sense, to every inhabitant of the country, and are not connected with the organization or administration of government, and include the rights of property, marriage, jury trial, etc. *Friendly v. Olcott*, 123 Pac. 53, 56, 61 Or. 580.

"A 'civil right' is said by Anderson to be a right accorded to every member of a distinct community or nation, and Bouvier says: 'Civil rights are those which have no relation to the establishment or management of the government. These

consist in the power to acquire and enjoy property, and of exercising the paternal and marital powers, and the like'. *People v. Barrett*, 67 N. E. 742, 743, 203 Ill. 99, 96 Am. St. Rep. 296.

"A civil right is the right of a citizen; the right of an idividual as an individual; the right due from one citizen to another, the privation of which is a civil injury for which redress may be sought by a civil action. *State of Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554 (citing Burr L. Dict. 296).

"By 'civil rights which are protected by the federal Constitution' is meant those rights which the municipal law will enforce, at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. They are distinguished from 'natural rights,' which would exist if there was no municipal law, some of which are abrogated by municipal law, while others lie outside of its scope, and still others are enforceable under it as 'civil rights.' 'Civil rights' are also distinguishable from 'political rights,' which are directly concerned with the institution and administration of government. 'Civil rights' include the right of every citizen to seek redress of wrongs and the enforcement of rights in the courts, and, as an incident to this, include the right of a party to testify in a criminal case in his own behalf. *State vs. Powers*, 17 Atl. 969, 970, 51 N. J. Law (22 Vroom) 432.

"The term. 'civil rights,' ordinarily 'means all those rights which the laws give a person, which depend upon the laws of the community in which he lives and of which he is a member.' *Bowles v. Habermann*, 95 N. Y. 246, 247.

"As defined by Bouvier, 'civil rights are those which have no relation to the establishment, support or management of government. These consist in the power of acquiring and enjoying property of exercising the parental and marital power, and the like.' They are the absolute rights of persons, the right of personal liberty, and the right to acquire and enjoy property as regulated and protected by law. They are the rights which, according to the fundamental principles of American government, are inalienable. *People v. Washington*, 36 Cal. 658-662.

"A civil right is a right accorded to every member of a district or community, while a political right is a right exercisable in the administration of government. Bouvier in his Law Dictionary says: 'Political rights consist in the power to participate directly or indirectly in the establishment of government or management thereof. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers and to be elected to office. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying power to exercise the paternal or marriage relation, or the like.' It will be observed that every one, unless deprived of them by sentence of civil death is in the enjoyment of civil rights, which is not the case of political rights. An alien, for an example, has no political rights, although in full enjoyment of the civil rights.' *Fletcher v. Tuttle*, 37 N. E. 683, 686, 151 Ill. 41, 25 L. R. A. 143, 42 Am. St. Rep. 220.

"Const. Art. 2, Par. 3, which declares that no

person shall be denied any 'civil or political right, privilege or capacity' on account of his religious opinions, means that whatever civil rights, privileges, or capacities belong to or are enjoyed by citizens of the state generally, shall not be taken from or denied any person on account of any religious views that he may entertain. *Hroneck v. People*, 24 N. E. 861, 865, 134 Ill. 139, 8 L. R. A. 837, 23 Am. St. Rep. 652."

A FEDERAL EQUITY COURT HAS NO JURISDICTION TO ENFORCE BY INJUNCTION THE POLITICAL RIGHTS OF A CITIZEN OF THE UNITED STATES.

In the case of ExParte Sawyer, 124 U. S. 200, this Court held as follows:

"Under the Constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 62 U. S. 21 How. 481, 484-487 (16: 198-200) *Thompson v. Central Ohio R. R. Co.*, 73 U. S. 6 Wall. 134 (18:765); *Heine v. Levee Comrs.*, 86 U. S. 19 Wall. 655 (22:223).

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to

invade the domain of the courts of common law, or of the Executive and Administrative Department of the Government."

In the case of *Cleveland Cliff Iron Company v. Village of Kinney* 262 Fed. Rep., page 980, Text 986, the court held as follows:

"It is the general rule that courts of equity have no jurisdiction in political matters, and that, in the absence of special statutory authority, courts of equity have no power to enjoin the holding of an election; and this is true, whether the election relates to the filling of public office or to other matters, such as changes in boundaries, or political sub-divisions and other kindred matters. *State of Ga. v. Stanton*, 6 Wall 50, 18 L. ed. 721; *Holmes v. Oldham*, 12 Fed. Cas. 421, No. 6,643; *Green v. Mills*, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90; *Anthony v. Burrow* (C. C.) 129 Fed. 783; *Taylor v. Kercheval* (C. C.) 82 Fed. 497, 500; *Angelus v. Sullivan*, 246 Fed. 54, 64, 158 C. C. A. 280; *Bonifaci v. Thompson* (D. C.) 252 Fed. 878; 879; *People v. City of Galesburg*, 48 Ill. 486, *Dickey v. Reed*, 78 Ill. 261; *Walton v. Develing* 61 Ill. 201; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; *Harris v. Schryock*, 82 Ill. 119; *People v. Barrett*, 203 Ill. 99, 67 N. E. 742, 96 Amer. St. Rep. 296; *People v. McWeeney*, 259 Ill. 161, 102 N. E. 233, Ann. Cas. 1916-B, 34; *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182; *Smith v. McCarthy*, 56 Pa. 359 Spelling on Inj. Sec. 630; Joyce on Inj. pars. 1386-1390; *Duggan v. Emporia*, 84 Kas. 429, 114 Pac. 235, Ann. Cas. 1912-A, 719; *City Council of McAlister v. Milwee*, 31 Okla. 620, 122 Pac. 173, 40 L. R. A. (N. S.) 576; McCrary on Elections,

par. 386; Pomeroy's Eq. Rem. vol. 1, sec. 331."

In *Angelus v. Sullivan*, 246 Fed. Rep. 54, the Circuit Court of Appeals, 2nd Circuit, held as follows:

> "But whatever remedy the complainant may have or not have, there can be no doubt that he is not entitled to the relief he asks in his bill of complaint. It has heretofore been laid down by the text-writers and the courts as beyond the scope of the powers of a court of equity to enforce mere personal rights as distinguished from property rights. This, it need not be said, has not been due to the fact that equity regarded rights of property as more sacred than rights of the person. *But the reason for it lies in the fact that equity affords no remedy where there is a full and adequate remedy at law and that the ordinary process of the law courts are fully adequate for the redress of wrongs to the person.*
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> "In Bispham's Equity (8th Ed.) p. 58, the rule is laid down that:
>
> " 'Equity is concerned only with questions which affect property, and it exercises no jurisdiction in matters of wrongs to the person as to political rights, or because the act complained of is merely criminal or illegal.'
>
> "In Kerr, on Injunctions Ed., pp. 1 and 2, it is said:
>
> " 'A court of equity is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. A court of equity has no jurisdiction in matters merely criminal or merely im-

moral, which do not affect any right to property. If a charge be of a criminal nature, or an offense against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained.'

"In the later editions of this work this statement is omitted because of an act of Parliament which has authorized the courts of that country to grant injunctions in cases where formerly they did not possess the power.

"In 16 Am. and Eng. Encyc. of Law, p. 363, the law is stated as follows:

" 'A court of equity has no criminal jurisdiction and cannot interfere to prevent the commission of criminal or illegal acts unless there is some interference, actual or threatened, with property or rights of a pecuniary nature; but when there is such interference, and there is no adequate remedy at law, the fact that the act may be criminal will not divest the jurisdiction of equity to prevent it.'

"And in the case of In Re: Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 487 (31 L. ed. 402) (188), the Supreme Court, speaking through Mr. Justice Gray, said that *'the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property'. To assume jurisdiction in other classes of cases he says would be to 'invade the domain of the courts of common law, or of the executive and administrative department of the government'.*

"Mr. Justice Brewer in the case of In Re: Debs, 158 U. S. 564, 593, 15 Sup. Ct. 900, 910 (39

L. ed. 1092) (1895) speaking for the court and discussing the power of a court of equity to issue an injunction, declared that:

" 'Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violation of the criminal law.'

"In *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217, 23 Sup. Ct. 498, 47 L. Ed. 778 (1903), Mr. Justice Brown, speaking for the Court as to the jurisdiction of a court of equity, cites approvingly In Re: Sawyer, supra, saying that no further reference is deemed necessary.

"In *Traux v. Raich*, 239 U. S. 33, 37, 33 Sup. Ct. 7, 60 L. ed. 131, L. R. A. 1916 D, 545 Ann. Cas 1917-B, 283 (1915) Mr. Justice Hughes refers to In Re: Sawyer, and declares that while a court of equity generally has no jurisdiction to restrain criminal prosecution under unconstitutional enactments, still it has such jurisdiction 'when the prevention of such prosecutions is essential to the safeguarding of rights of property.'

"In *Green v. Mills*, 69 Fed. 852, 16 C. C. A., 516, 30 L. R. A. 90 (1895), a case in the Circuit Court of Appeals for the Fourth Circuit, Chief Justice Fuller, sitting as a Circuit Judge, and writing the opinion, it was held that a court of equity had no jurisdiction of a bill seeking to enjoin a county supervisor of registration from per-

forming the duties prescribed by the state registration laws, on the ground that such laws were unconstitutional and operated to deprive the plaintiff and others of their right to vote. In the course of his opinion the Chief Justice said:

" 'It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral which do not affect any right of property.'

"In *Corliss v. E. W. Walker Co.* (C. C.) 57 Fed. 434, 31 L. R. A.283 (1893), Circuit Judge Colt said:

" 'There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. * * * * It follows from this principle that a court of equity has no power to restrain a libelous publication.'

"In *Taylor v. Kercheval* (C. C.) 82 Fed. 497 (1897) District Judge Baker said:

" 'It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights; such courts have no jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government ex-

cept under special circumstances, and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts unless they affect or threaten to invade rights of property.'

"In *Muhler v. Hedekin,* 119 Ind. 481, 20 N. E. 700 (1889), the court, speaking of a court of chancery, declared that:

" 'The subject-matter of their jurisdiction relates to civil property * * * * actual or threatened, is the foundation of chancery jurisdiction. It is not concerned with matters of political nature * * * * The general principle that equity possesses no power to revise, control or correct the action of public, political, or executive officers or bodies, is, of course, well understood.'

"In *Chappell vs. Stewart,* 82 Md. 223, 33 Atl. 542, 37 L. R. A. 783, 51 Am. St. Rep. 476 (1895), a bill alleged that defendant had employed detectives to watch the plaintiff and thereby caused annoyance and damage to him, and asked for an injunction to restrain the alleged conduct. The injunction was refused by the court below, and the Supreme Court affirmed, and said:

" 'Courts of equity exercise a very extensive jurisdiction in cases involving property rights. * * * In this case it is alleged that rights affecting the complainant's person have been violated, and that there is a purpose to persist in violating them. The ordinary processes of law are fully competent to redress all injuries of this character. They have always been considered beyond the scope of the powers of a court of equity.'

"Numerous other cases have announced the

same doctrine, a few of which are cited: *Fletcher vs. Tuttle*, 151 Ill. 41, 53, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220 (1894); *City of Chicago vs. Chicago City Ry. Co.*, 222 Ill. 560, 570, 78 N. E. 890 (1906); *Brown vs. Birmingham*, 140 Ala. 590, 596, 37 So. 173 (1903); *Winnett vs. Adams*, 71 Neb. 817, 824, 99 N. W. 681 (1904); *Roberson vs. Rochester Folding Box Co.*, 171 N. Y. 538, 550, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (1902); *Vanderbilt vs. Mitchell*, 72 N. J. Eq. 910, 67 Atl. 97, 14 L. R. A. (N. S.) 304; *Northwestern Law Review*, vol. 3, p. 1."

In *Taylor vs. Kerchevak*, 82 Fed. 497, the Court held as follows:

"But the jurisprudence of the United States has always recognized the distinction between common law and equity, under the constitution, as matter of substance, as well as of form and procedure; and this distinction has been steadily maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481; *Thompson v. Railroad* Co., 6 Wall, 134; *Cates v. Allen*, 149 U. S. 451; 13 Sup. Ct. 883, 977; *Mississippi Mills v. Cohn*, 150 U. S. 202, 205, 14 Sup. Ct. 75. It is firmly settled that courts of chancery concern themselves only with matters of property and the maintenance of civil rights. Such courts have no jurisdiction in matters of an executive or political nature; nor do they interfere with the duties of any department of the government, except under special circumstances, and then only when necessary to the protection of rights of property; nor can they interfere to restrain criminal or immoral acts, unless they affect or threaten to invade rights of property. In *re Debs*, 158

U. S. 564, 15 Sup. Ct. 900; *Luther v. Borden*, 7 How. 1; *Mississippi v. Johnson*, 4 Wall 475; *State of Georgia v. Stanton*, 6 Wall 50; *in re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Holmes vs. Oldham*, Fed. Cas. No. 6,643; *Muhler v. Hedekin*, 119 Ind. 481, 20 N. E. 700. 'Neither the legislative nor the executive department,' said Justice Chase, speaking for the Court, in *Mississippi vs. Johnson*, supra, 'can be restrained by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.'

"And, Mr. Justice Gray, speaking for the court in re Sawyer, supra, said:

" '*The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property.*'

"And it is clear that the complainant has in no just sense a right of property in his office or employment, for, if he had, congress would be powerless to abolish his office or to impair its tenure. To assume jurisdiction to control the exercise of executive or political powers, or to protect individuals in the enjoyment of purely political rights, would be to invade the domain of other departments of the government, or to intrench upon the jurisdiction of the court of common law.

"In 2 Beach, Mod. Eq. Jur. Sec. 670, it is said:

" 'The jurisdiction to determine the title to a public office belongs exclusively to courts of law, and equity has no jurisdiction over the appointment and removal of public officers, and will not interfere in cases of this character, even in a col-

lateral or indirect proceeding, or in a bill to enjoin.' "

In the case of *Anthony vs. Burrow*, 129 Federal Reports, 783, the court held as follows:

"The first question naturally arising for determination is, does a federal court of equity have jurisdiction to hear and determine a controversy of such nature as that charged in the bill of complaint? The general jurisdiction of this court is invoked, first, on the ground that the controversy involves the jurisdictional amount, and arises under a law of the United States. That law is the Act of Congress of February 7th, 1891, commonly known as the 'Reapportionment Act' which increased the number of representatives in Congress from this state to eight and section 4 of which act provides:

" 'That in case of an increase in the number of representatives which may be given to any state under this apportionment, such additional representative or representatives shall be elected by the state at large, and the other representatives by the districts now prescribed by law until the Legislature of such state in the manner herein prescribed shall redistrict such state, and if there be no increase in the number of representatives from a state the representatives thereof shall be elected from the districts now prescribed by the Legislature of such state.' 26 Stat. 736, c. 116.

"By the provisions of section 2 c. 1, p. 1, Laws 1883, the Legislature of the state had provided that the counties of Atchison, Brown, Doniphan, Nemaha, Jackson, Jefferson, Leavenworth, and Pottawatomie, should constitute the First Con-

gressional District of the state, and such counties did constitute the First Congressional District at the date of the reapportionment act of Congress, above mentioned. While it is not so averred in the complaint, yet it is a well known fact, of which this court takes judicial knowledge, that the Legislature of the state, at its 1897 session, enacted as follows:

" 'That section 2 of chapter 1 of the session laws of 1883, be and the same is hereby amended so as to read as follows: Sec. 2. The counties of Nemaha, Brown, Doniphan, Jackson, Atchinson, Jefferson, Leavenworth, and Shawnee, shall constitute the First District.' Section 1, c. 90, p. 181, Laws 1897.'

"Hence the contention of complainant is that Congress having declared the counties comprising the First Congressional District at the time of the Reapportionment Act should constitute the First Congressional District until the state should, by act of the Legislature, be redistricted in congressional districts, and as the taking of Pottawatomie county out of the first district and placing Shawnee county therein, was not a redistricting of the state, Shawnee County constituted no lawful part of the First Congressional District at at the date of the Holton convention, and the delegates therefrom were not entitled to a voice in such convention.

"Does such contention raise a federal question cognizable in this court sitting in equity? By the repeated adjudications of the Supreme Court it is conclusively settled that a case arises under the Constitution or laws of the United States, whenever, upon the whole record, there is a con-

troversy involving the construction of either. *Cohens vs. Virginia*, 6 Wheat 264, 5 L. Ed. 257; *Nashville vs. Cooper*, 6 Wall, 247, 18 L. Ed. 851; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648. In so far, therefore, as general jurisdiction of this court depends, the question is, does the decision of this controversy depend upon a construction of the reapportionment act of Congress mentioned? The power to determine the number of representatives in Congress and to apportion that number among the several states resides in and can be exercised only by the Congress of the United States. In the exercise of that power the reapportionment act from which the above question is made was enacted fixing the number of representatives in Congress, from the State of Kansas at 8, and providing for their election. But the power to divide the territory of a state into congressional districts, for the purpose of selecting members of Congress apportioned to a state, is a power residing in the Legislature of a state, and not in the Congress of the United States; as is recognized by said act of Congress. In the exercise of that power the act of the Legislature of 1897, was passed, taking the county of Pottawatomie from, and adding the county of Shawnee to, the First Congressional District. Hence it is apparent that the right of Shawnee County to participate in the proceedings of the Holton Convention, under the averments of complainant's bill does not depend upon the true construction of the 'reapportionment act' of Congress, but does depend upon the validity of the act of the Legislature of the state placing the county of Shawnee in the First Congressional District; and the validity or invalidity of that act of the Legislature is a question for the determination

of the courts of the state, and does not involve a federal question for determination by this court, unless the further contention made by solicitors for complainant may be sustained.

"Such further contention is that under section 2, art. 1, of the federal Constitution, the electoral machinery of the state, when employed for the purpose of selecting representatives in Congress from a state, become laws of the United States, and are to be construed the same as though enacted by Congress for that purpose. In other words, if the determination of this controversy depends upon the construction of acts of the Legislature of the state of Kansas, employed for the purpose of selecting a candidate for the office of representative in Congress from the First Congressional District of the state, such controversy becomes one cognizable by the federal courts, to the same extent as though the construction of the Federal Constitution or laws was directly involved. In support of this contention, *Ex Parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45, L. Ed. 84, and *Swafford vs. Templeton*, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005, are cited. However, an examination of those cases would show the sole question therein determined was, in the Yarbrough case, the sufficiency of the Federal criminal laws to punish one who unlawfully obstructs a person qualified under state laws from voting for a member of Congress; and, in other cases, that federal courts have jurisdiction of an action at law brought by one qualified under state laws to vote for a member of Congress, who is wrongfully prevented from voting; and this, because section 2 of article one of the federal con-

stitution adopts the qualifications required under state laws to vote for a member of the more numerous branch of the state Legislature as the test of the proper qualifications to vote for a member of Congress. From this it will be seen that the claim made by solicitors for complainant, that the above and kindred cases hold the election machinery employed by the state in the selection of candidates for the office of representatives in Congress, becomes, when so employed, a part of the federal law, and the construction of the same raises a federal question, is claiming too much for such cases.

"As the question at bar is not the right to vote, but the privilege of being voted for, and as this is not an action at common law for damages, but relief is sought by a bill in equity, the question whether this court in equity has jurisdiction to grant the injunction prayed remains. It must be apparent to anyone that the relief sought by complainant under his bill, in so far as it prays an order of this court directing the defendant, Burroe, as Secretary of State, of the State of Kansas, to forthwith certify to the several county clerks of the counties comprising the First Congressional District the name of complainant as the party candidate to be placed on the official ballot, to be voted at the coming November election, is not a proper subject of equity, for such relief can only be afforded in an action of mandamus, which is an action at law, and that a federal court of equity will not grant a mandatory injunction upon a preliminary or interlocutory motion against officers of a state, but, if at all, only upon final hearing, and then only to execute the decree of judgment of the court. *Walkley vs. City of Muscatine*, 6 Wall,

483, 18 L. ed. 930; *Fletcher v. Tuttle* (Ill.), 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220; *McCauley vs. Kellogg, et al.*, 2 *Woods*, 13 Fed. Cas. No. 8,688; *Audenried vs. Philadelphia and Reading R. Co.*, 68 Pa. 370, 8 Am. Rep. 195; *Rogers Locomotive Works v. Erie Railroad Co.*, 20, N. J. Eq. 379.

"As to the temporary restraining order now asked, the argument made by solicitors for complainant is that the concluding portion of section 2703, Gen. St. Kan. 1901, above quoted, recognizes the right to proceed in equity in the state courts to restrain the action of the board of which the defendants are members. Hence such remedy, under repeated decisions of the federal courts, may be available in this court, sitting as a court of equity. *Ex Parte McNeil*, 13 Wall 236, 20 L. Ed. 624; *Doris v. Gray*, 16 Wall, 203, 21 L. Ed. 447; *Cowley v. Northern Paficic Railroad Company*, 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263, and many other cases are cited in support of the contention made. While it is true that the rights created and remedies provided by the statute laws of a state may be enforced in the federal courts, either in law or in equity, yet the enforcement of such statutory rights and remedies by the federal first presupposes jurisdiction in the federal courts and while the statute under consideration recognizes the right to obtain relief by injunction in the state courts under certain conditions, yet it creates no such right, and in my judgment no such right exists in this court sitting as a court of equity, and this for the following reasons: The right to become the nominee of a political party for a public office, whether national or state, and as such nominee to receive the votes of the quali-

fied electors voting to fill such office, is a purely political right as contra-distinguished from a civil or property right. In *Re Sawyer*, 124, U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, Mr. Justice Gray says:

" 'The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property.

" 'Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers, and of being elected. These are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the lik . It will be observed that everyone, unless deprived of them by the sentence of civil death, is in the enjoyment of civil rights, which is not the case with political rights, for an alien, for example, has no political, although in full enjoyment of the civil, rights.' 2 Bouv. Law Dict. 597.

"Mr. Justice Fuller, sitting as Circuit Judge in *Green v. Mills*, 69 Fed. 857, 16 C. C. A. 522, 30 L. R. A. 90, says:

" 'The jurisprudence of the United States has always recognized the distinction between common law and equity, as, under the Constitution, matter of substance, as well as of form and procedure. And the distinction has been steadily maintained, although both jurisdictions are vested in the same court. *Fenn vs. Holme*, 21 How. 481

(16 L. Ed. 198); *Thompson vs. Railroad Co.*, 6 Wall, 134 (18 L. ed. 765); *Cates v. Allen*, 149 U. S. 451 (13 Sup. Ct. 883, 37 L. Ed. 804); *Mississippi Mills vs. Cohn*, 150 U. S. 202 (14 Sup. Ct. 75, 37 L. Ed. 1052). It is well settled that a court of chancery is conversant only with the matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of political nature, nor to interfere with the duties of any department of government, unless such special circumstances, and when necessary to the protection of the rights of property, nor in matters merely criminal or merely immoral, which do not affect any right of property. In *re Sawyer*, 124 U. S. 200 (8 Sup. Ct. 482, 31 L. Ed. 402); *Luther v. Borden* 7 How. 1 (12 L. ed. 581); *Mississippi vs. Johnson*, 4 Wall 475 (18 L. ed. 437); *Georgia vs. Stanton*, 6 Wall 50 (18 L. ed. 721); *Holmes vs. Oldham*, 1 Hughes, 76 (Fed. Cas. No. 6,643)'

"The precise question here under consideration was ruled by the Supreme Court of Illinois in *Fletcher vs. Tuttle*, 151 Ill. 41, 37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220. It is there said:

" 'The question then is whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights a matter of judicial solitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think that they do not come within the proper cognizance of courts of equity. In *Sheridan vs. Colvin*, 78 Ill. 237, this court adopting,

in substance the language of Kerr on Injunctions, said: "It is elementary law that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not afford any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances, and where necessary for the rights of property". *Georgia vs. Stanton*, 6 Wall 50 (18 L. ed. 721); In *re Sawyer*, 124 U. S. 200 (18 Sup. Ct. 482, 31 L. Ed. 402); *Sheridan v. Colvin*, 78 Ill. 237; *Dickey v. Reed*, 78 Ill. 261; *Harris vs. Schryock*, 82 Ill. 119, and other cases, are cited in support of the doctrine announced.'

"Again in that case, it is said:

" 'Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, may be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an

election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political administration has disobeyed or threatens to disobey the mandate of the law whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy, but his remedy must be sought in a court of law, and not in a court of chancery.'

"In *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584, it is said:

" 'On this branch of the inquiry it seems to the court very clear that a court of equity cannot be invoked to prevent the performance of political duties like those committed to the officers of registration under the law. The willful, fraudulent, or corrupt refusal of a vote by judges of election, or a like denial of registration by the officer appointed to register votes, which is the same thing, can be adequately compensated for in damages at law. The writ of injunction will not be awarded in doubtful or new cases not coming within the well-established principles of equity. *Boneparte v. Railroad Co.*, Fed. Cas. No. 1, 617.'

"In *People v. Canal Board*, 55 N. Y. 393, it is said:

" 'A court of equity exercises its peculiar jurisdiction over public officers to control their ac-

tions only to prevent a breach of trust affecting public franchises, or some illegal act, under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction.'

"In *Giles v. Harris*, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909, it is held:

" 'A circuit court of the United States in Alabama has not jurisdiction of an action in equity brought by a colored man, resident in Alabama, on behalf of himself and other negroes, to compel the board of registrars to enroll the names upon the voting lists of the county in which they reside under a Constitution alleged to be contrary to the Constitution of the United States.'

"From an examination of the authorities I am persuaded this court has no jurisdiction to restrain the board of which the defendants are the constituent members created under the statute above quoted from acting, upon the ground that such statute is unconstitutional and void, or upon any ground set forth in the bill. The right sought to be enforced under the allegations of the bill filed in this case being a political right, and not a civil or property right, this court has no jurisdictin to entertain the bill, and a temporary restraining order against the defendants as officers of the state constituting such board, under the law above quoted, may not and should not be granted. There is no equity in the bill, and same will be dismissed."

In the case of *Mountain Timber Company vs. State of Washington*, 243 U. S. 219, 61 L. Ed. 685, the Court held as follows:

> "Two of the constitutional objections may be disposed of briefly. It is urged that the law violates Section 4 of article 4 of the Constitution of the United States guaranteeing to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts. *Luther v. Borden* 7 How. 1, 39, 42, 12 L. ed. 581, 597, 599; *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kiernan v. Portland*, 223 U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 231; *Marshall v. Dye*, 231 U. S. 250, 256; 58 L. ed. 206, 207, 34 Sup. Ct. Rep. 92; *Ohio ex rel Davis v. Hildebrandt*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708."

In the case of *Ohio vs. Hildebrandt*, 231 U. S. 565, 60 L. ed. 1172, the Supreme Court held that whether or not a state has ceased to be republican in form within the meaning of the guaranty of the United States Constitution, Article 4, Section 4, because it has made the referendum a part of the legislative power is not a judicial question but is a political question, which is solely for Congress to determine.

Said sub-section 14 gives the Federal Courts jurisdiction to redress the deprivation of any right secured by the Constitution or any law of the United States "providing for equal rights of citizens of the United States."

Ruling Case Law states the rule as follows:

Ruling Case Law, Vol. 9, Page 987, Section 10:

JURISDICTION OF COURTS IN ELECTION MATTERS GENERALLY:—In considering the general powers of the courts, a distinction has been drawn between the jurisdiction of courts of equity and of law, based upon a distinction between political and civil rights. Political rights have been defined to be rights exercisable in the administration of government and comprehend the power to participate directly or indirectly in the establishment or management of the government. They are opposed to civil rights which broadly comprehend all rights accorded to every member of a district or nation. In view of this distinction, the right of suffrage being political in character, it has been generally held that its assertion and protection are not properly matters for the cognizance of courts of equity, for the subject of the jurisdiction of such courts is civil property, and they are not concerned with the maintenance of purely political rights where no civil or property right is involved. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office. Nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law, in pursuance of which, an election shall be held. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in

his political rights, must seek his remedy in a court of law, and not in a court of chancery. 12 *Fletcher vs. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 A. S. R. 220, 25 L. R. A. 143; *People vs. Barrett*, 203 Ill. 99, 67 N. E. 742, 96 A. S. R. 296; *Shoemaker v. Des Moines*, 129 Ia. 244, 105 N. W. 520, 3 L. R. A. (N. S.) 382 and note; *U. S. Standard Voting Mach. Co. v. Hobson*, 132 Ia. 38, 109 N. W. 458, 119 A. S. R. 539, 10 Ann. Cas. 972, 7 L. R. A. (N. S.) 512; *Duggan vs. Emporia*, 84 Kas. 429, 114 Pac. 235, Ann. Cas. 1912 A719 and note; *Weaver vs. Toney*, 107 Ky. 419, 54 S. W. 732, 50 L. R. A. 105; *Conner vs. Gray*, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120 and note; *State v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *State vs. Hogan*, 24 Mont. 379, 62 Pac. 493, 51 L. R. A., 958; *City Council of McAllister v. Milwee*, 31 Okla. 620, 122 Pac. 173, 40 L. R. A. (N. S.) 576; *Alderson v. Kanawha County Court Commr's*, 32 W. Va. 640, 9 S. E. 868, 25 A. S. R. 840, 5 L. R. A. 394.

RULING CASE LAW, VOLUME 10, PAGE 342, SECTION 92:

POLITICAL RIGHTS:—Matters of a political character are also outside the pale of a court of equity, no such jurisdiction having ever been conceded to a chancery court, either in a federal or state judiciary, unless it is so provided expressly or impliedly by organic or statute laws. The political rights of a citizen are as sacred as are his rights to a personal liberty or property, but he must go to a court of law for them. A court of equity is a one-man power, wielding the strong force of injunction, often issued at chambers, and on an ex parte hearing. Neither in England nor America has this power been suffered to extend to political affairs. 9

9. *Giles v. Harris,* 189 U. S. 475, 23 S. Ct. 639, 47 U. S. (L. ed.) 909; *Green v. Mills,* 69 Fed. 852, 25 U. S. Apps. 383, 16 C. C A 516, 30 L R A 90; *Walls v Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas 1915C 980 and note; *Market v. Sumpter County,* 60 Fla. 328, 53 So. 613, Ann. Cas. 1912C 690 and note; *Fletcher v. Tuttle,* 151 Ill. 41, 37 N. E. 683, 42 A. S. R. 220 and note, 25 L. R. A. 143; *Heffran v. Hutchins,* 160 Ill. 550, 43 N. E. 709, 52 A. S. R. 353; *Shoemaker v. Des Moines,* 129 Ia. 244, 105 N. W. 520, 3 L. R. A. (N. S.); *Standard Voting Mach. Co. v. Hobson,* 132 Ia. 38, 109 N. W. 458, 119 A. S. R. 539, 10 Ann. Cas. 972 and note, 7 L. R. A. (N. S.) 512; *Duggan v. Emporia,* 84 Kas. 429, 114 Pac. 235; Ann. Cas. 1912A 719 and note; *Weaver v. Toney,* 107 Ky. 419 54 S. W. 432, 50 L. R. A. 105; *Hardesty v. Taft,* 23 Md. 512, 87 Amer. Dec. 584; *State v. Aloe,* 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *Arnold v. Henry,* 155 Mo. 48, 55 S. W. 1089, 78 A. S. R. 556.

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RULING CASE LAW, VOLUME 14, PAGE 375, SECTION 77.

ELECTIONS:—Matters relating to elections, such as the right to vote and the like, are generally regarded as being within the application of the doctrine that equity will not interfere in matters of a political nature. The accepted rule is that the extraordinary jurisdiction of a court of chancery cannot be invoked to protect the right of a citizen to vote, or to be voted for at an election, or his right to be a candidate for, or to be elected to any office, nor can it be invoked to restrain the holding of an election, or of directing or controlling the mode in which, or of determining the

rules of law in pursuance of which an election shall be held. Such matters involve no property rights, but pertain solely to the political administration of government. 9

9. *Green v. Mills*, 69 Fed. 852, 25 U. S. App. 383, 16 C. C. A. 516, 30 L. R. A. 90; *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 A. S. R. 220 and note, 25 L. R. A. 143; *United States Stand. Voting Mach. Co. v. Hobson*, 132 Ia. 38, 109 N. W. 458, 119 A. S. R. 539, 10 Ann. Cas. 972, 7 L. R. A. (N. S.) 512.

In this connection, sub-section 15 of said Section 24 of the Judicial Code is very material. This section gives the federal courts jurisdiction "of all suits to recover possession of any office except that of elector of President or Vice-President, any representative in or delegate to Congress, or member of a state legislature, wherein it appears that the sole question touching the title to such office arising out of the denial of the right to vote to any citizen offering to vote on account of race, color or previous condition of servitude."

This provision enlarges the jurisdiction of said courts because under the authorities hereinbefore cited such courts did not have any jurisdiction touching political rights. This section gives such courts the jurisdiction to try the title to said offices when the question of the right to vote is involved. However, members of Congress are especially excepted therefrom and the denial of the right to vote must be on account of race, color or previous condition of servitude.

This section gives the court jurisdiction where certain political rights are involved. To give jurisdiction therein is to exclude jurisdiction in any other matters.

The Congress of the United States certainly did not intend to provide that the federal courts did not have jurisdiction to try the rights of offices, and then allow such courts to govern and control elections for the purpose of electing such officers. If this were a suit to recover possession of office as a member of Congress it is clear under the express provision of said section that this Court would have no jurisdiction. It would, indeed, be a peculiar situation to say that this Court could control the manner of holding an election and then could not determine whether or not the officer had been duly and legally elected. Said section grants to this Court its jurisdiction in reference to political questions. The granting of such jurisdiction excludes any and all other jurisdictions in reference to such matters.

We often hear the expression "inadequate remedy at law." If Federal Courts are allowed to control elections by injunction, then it may well be said that the equitable remedy is inadequate. In the very nature of such cases, they could not or would not be brought until a very short time prior to the date for holding the election. In the event the injunction was illegally denied, plaintiff could not have time to prosecute his appeal and get the cause determined by a Court of final jurisdiction prior to the election. In the event the injunction was improvidently issued, then the defendant could not get his rights determined by a court of final jurisdiction. The case at bar very aptly illustrates this point. Plaintiff was granted a preliminary injunction on August 6th. If defendants had then answered and denied any material allegation in the original bill, the election would have been held before the

case was triable under the rules of practice prevailing in the Federal District Courts. In order to get a trial of the case after a preliminary injunction was issued defendants were compelled to admit all allegations of the bill; then it is only by the good graces of this Court that appellants are able to get their appeal heard and determined prior to the election.

A case of this character in a court of equity could hardly be imagined where the losing party could get the issues determined by a higher court prior to election.

Plaintiff could have waited until a few days before the election when it would have been impossible to get any kind of a hearing except the motion for a preliminary injunction.

My information is that an original bill has been filed in the Federal Court in Tennessee within the last few days, praying that an injunction be granted prohibiting the holding of the elections in that state form districts. Insofar as this election is concerned, the decree of the Court on preliminary injunction will be final.

I, therefore, most respectfully submit that this Court has no jurisdiction to determine the questions involved in this lawsuit.

III.

UNDER THE FACTS STATED IN THE BILL PLAINTIFF IS NOT ENTITLED TO HAVE HIS NAME PLACED ON THE BALLOT AS A CANDIDATE FOR CONGRESS FROM THE STATE AT LARGE.

Section 6176, Code of 1930, creates the State Board of Election Commissioners, which consists of the governor, the secretary of state and the Attorney General.

Section 6177 of said Code provides that "two months before every general election of representatives in Congress, and of elector of president and vice-president of the United States, the State Board of Election Commissioners shall appoint the commissioners of election for each county, who, shall continue in office for two years, unless removed, and until successors are appointed, one of whom shall be designated in his commission to have the official ballot printed and distributed."

Section 6231, Code of 1930, provides as follows:

> "The ballot shall contain the names of all candidates who have been put in nomination, not less than fifteen days previous to the day of election, by the primary election of any political party. There shall be printed on the ballots the names of all candidates so nominated, whether the nomination be otherwise known or not, upon the written request of one or more of the candidates so nominated, or of any qualified elector who will make oath that he was a participant in the primary election, and that the person whose name is presented by him was nominated by such primary election. The commissioner shall also have printed on the ballot the name of any qualified elector who has been requested to be a candidate for any office, by a written petition signed by at least fifteen electors, for any beat or municipal office in a town or village of less than three hundred inhabitants, or fifty qualified electors for any other office, and

when the petition or request has been presented to said commissioner not less than fifteen days before the election; but if any candidate has been so nominated, or has been so requested to become a candidate, less than fifteen days before the election, his name shall not be printed upon the ballot." Section 6234 provides as follows:

"The arrangement of the names of the candidates, and the order in which the titles of the various offices shall be printed, and the size, print, and quality of paper of the official ballot is left to the discretion of the officer charged with printing the official ballot; but the arrangement need not be uniform. It is the duty of the secretary of state, with the approval of the governor, to furnish the designated commissioner of each county a sample of the official ballot, the general form of which shall be followed as nearly as practicable: Provided that in all primary elections the names of the candidates for each office separate shall be arranged alphabetically."

It is clear from these provisions that county election commissioners for each county will be appointed prior to the election to be held in November. The petition to have one's name placed on the ballot is required to be filed fifteen days prior to the general election. Therefore, the duty to make up the ballot for the general election to be held in November will necessarily be performed by the new Board of Election Commissioners. The statute provides that these officers shall be appointed two months prior to the general election, and that the ballot shall be made up fifteen days prior to the election.

The bill alleges that Mr. Broom filed his petition with the election commissioners of Hinds County and that these commissioners declined to accept same. The reason for declining this petition was very probably that said Commission would be out of office and that it was no part of its duty to prepare for the coming election. The new Commission could grant the petition, or if the old commission had disallowed the petition then the new commission could act upon it or another one and give the plaintiff all the rights he is now claiming in this court.

The bill further alleges that it is the duty of the Secretary of State to receive the returns of the primary elections and to determine therefrom who has been nominated. This is not true. These duties are placed upon the State Democratic Executive Committee, and the Secretary of State has absolutely nothing to do therewith. See Section 5895, Code of 1930.

The plaintiff further alleges that he filed a petition with the Secretary of State signed by fifty qualified electors requesting that the Secretary of State place his name upon the sample ballot to be furnished the election commissioners of the county. There is no provision in the law for such a petition. Section 6234 of the Code hereinabove quoted does provide for the Secretary of State, with the approval of the Governor, to make up the sample ballot but there is no provision for the petition set out in the original bill. In order to have his name placed upon the ballot a person must either be nominated by a party primary or he must present to the election commissioner (that is, the county commissioner designated in Section 6177, to

have the official ballot prepared for each county) of each county a petition signed by fifty qualified electors. In other words, a person would not be entitled to have his name placed upon the ticket from the State at large unless he had been nominated by a primary or unless he had filed a petition signed by fifty qualified electors with the election commissioner of each county, then when this information is furnished to the Secretary of State he would be authorized, if the same were approved by the Governor, to place such name on the official ballot.

Said Section 6234 provides that the Secretary of State, "with the approval of the governor," shall furnish the designated commissioners of each county a sample official ballot. There is no allegation in the bill that the Governor approved the petition as filed by said plaintiff.

Even though the election commissioner of Hinds County had received the petition mentioned in plaintiff's bill, and declared it to be his intention to place the name of plaintiff on the official ballot, it would not have availed plaintiff anything for the reason that the election commissioner could not place plaintiff's name on the official ballot unless it had been placed upon the sample ballot furnished by the Secretary of State with the approval of the Governor.

The Secretary of State would not be authorized to place plaintiff's name on the sample ballot unless plaintiff had filed the petition signed by fifty qualified electors with the election commissioner of each county.

The law certainly does not intend to say to one man that in order to get your name on the ticket as party nominee you must make a state-wide campaign and secure the nomination of your party, and to another man, you may get your name on the ticket by simply filing with the Secretary of State a petition signed by fifty qualified electors of the State.

IV.

THE DECREE OF THIS COURT WOULD BE INEFFICACIOUS.

This proposition will be argued under sub-headings as follows:

(a). The election could be held without the expenditure of public money.

(b). The Governor must approve the sample ballot. No injunction is prayed for against him.

(c). An injunction against the election commissioners of Hinds County would not be effective.

(d). The decree of the court could not be enforced.

(e) Congress is the judge of the election of its own members and could annul the decree of this Court.

IV. (a).

THE ELECTION COULD BE HELD WITHOUT THE EXPENDITURE OF PUBLIC MONEY.

Under the laws of the State of Mississippi, the State Highway Commissioners from each of the three districts, and Judges of the Supreme Court from each of the districts are to be elected this year. It, of course, will be necessary to hold primary elections and a general election for the election of said Highway Commissioners and Judges. It will not cost the State of Mississippi anything additional to hold the primaries and the general election to elect members of Congress. The expense of holding such elections will be incurred to elect said Highway Commissioners and Judges even though there is no primary or general election for members of Congess. The expense of such election cannot and will not be increased by placing the names of the candidates for Congress thereon. The printing expense wil be the same; the expense for ink, paper, pens, and other incidentals, will be the same, and no part of the public funds will be saved if this Court enjoins the holding of said election.

Plaintiff does not pray that the election for Congress be enjoined, but merely prays that the Secretary of State and the Chancery Clerk of Hinds County be enjoined from expending public funds in the holding of said election.

Even though the injunction were granted as prayed for, the election could be held without violating the injunction because no public money would be expended on account thereof.

IV. (b).

THE GOVERNOR MUST APPROVE THE SAMPLE BALLOT. NO INJUNCTION IS PRAYED FOR AGAINST HIM.

Under the provisions of Section 6234, Code of 1930, the Secretary of State can only prepare and furnish to the county election commissioners a sample ballot when such ballot is approved by the Governor. The plaintiff in this case does not pray for an injunction to be issued against the Governor. There is no allegation that the Governor approved or disapproved the action of the Secretary of State. Even though this Court were to order the Secretary of State to place plaintiff's name on the ballot, it would be ineffective unless the Governor would approve it. Therefore, plaintiff would obtain no relief by having a mandamus issued against the Secretary of State.

In the case of *State ex rel v. Danaher*, 47 Mont. 570, 133 Pac. 961, Ann. Cases 1915-C, 130, it appeared that Danaher purchased certain state lands at a sale held pursuant to the provisions of the Montana statute and thereby became entitled to a certificate signed by the register and by the Governor, as members of the Board of Land Commissioners. Danaher brought mandamus proceedings against the register to compel him to issue the certificate but the court refused to issue the writ on the ground that it would accomplish no beneficial result since the Governor was not a party to the litigation. The Court said:

> "It will be observed that while this section enjoins upon the register the duty to issue the certificate, it must be signed by the Governor as president of the Board of Land Commissioners. If it does not bear the signature of this officer, it is not complete, nor is it effective for any purpose. In effect, therefore, the duty enjoined by this section is made the joint duty of the register and the governor, as president of the Board of Land

Commissioners. Neither can act effectively without the other. Now it does not appear from the statement of facts, or otherwise from the record, that the certificate has been executed ready for delivery by the register. It is stipulated merely that on August 18, 1911, the relatrix made written demand upon the register for the issuance and delivery of the certificate and that he then and there refused to issue and deliver it. It does not appear that any demand was made upon the governor. The issuance of the writ would have, therefore, not given the relatrix any effective relief, for though the register were compelled to perform the duty enjoined upon him so far as he might, the governor would be under no compulsion to act with him and would be free to refuse to add his signature. Then the relatrix would have gained no substantial relief. The rule is well settled that when the writ will accomplish no beneficial result, it will be denied. The same rule applies where the official act to be performed depends upon the act, approval or co-operation of a third person not a party, even though it is clearly the duty of the defendant to act."

In *People v. Bunne*, 258 Ill. 441, 101 N. E. 560, 45 L. R. A. (N. S.) 500, mandamus proceedings were instituted against the Governor, the Secretary of State, the Auditor, the Treasurer, and the Attorney General, as the canvassing board of the State of Illinois to require them to declare the relators elected to certain offices. The Supreme Court denied the writ on the ground that the Governor had authority to proclaim the election and issue the certificates and that mandamus proceedings could not be maintained against him to compel him to perform these acts.

The Court held, in effect, that the members of the State Canvassing Board could not be compelled to canvass returns and declare the election of relators to public office because the writ would be ineffectual since the governor could not be compelled to issue a proclamation and certificate.

18 Ruling Case Law, Section 66, states the rule as follows:

> "When the operative effect of the action sought to be coerced depends upon the co-operative action of a third person, who is not before the Court, the writ will not ordinarily be granted, as its issuance would ordinarily be nugatory, the court having no power to coerce the co-operation of such third person."

Furthermore, the court has no power to compel the governor by mandamus to perform any duty imposed upon him by law.

Vicksburg & R. Co. v. Lowry, 61 Miss. 102;

18 Ruling Case Law, Sections 121, 122, 123, 124, and 125.

The injunction would, therefore, be inefficacious and should not be granted.

IV. (d).

THE DECREE OF THE COURT COULD NOT BE ENFORCED.

In the case of *Giles v. Harris*, 189 U. S. 475, 47 L. ed.

909, the plaintiff filed his bill alleging that he and five thousand other negroes were denied the right to register as qualified electors in the State of Alabama and prayed for an injunction to require the proper authorities to register them. The Court held as follows:

> "The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in Section 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a state, although the state is not and could not be made a party to the bill. *Hans v. Louisiana,* 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504. The circuit court has no constitutional power to control its action by any direct means. And, if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the

state itself, must be given by them or by the legislative and political department of the government of the United States."

IV. (e).

CONGRESS IS THE JUDGE OF THE ELECTION OF ITS OWN MEMBERS AND COULD ANNUL THE DECREE OF THIS COURT.

Article I, Section V, Paragraph 1, provides as follows:

> "Each House shall be the judge of the elections, returns and qualifications of its own members."

This provision of the Constitution expressly and emphatically provides that the House of Representatives shall be the Judge of the election of its own members. In the event this Court decides that said House Bill No. 197 is unconstitutional and that the election should be from the State at large, and members of Congress are elected from the State at large, then when they presented themselves to the House of Representatives it would be within the power of said House of Representatives to determine whether or not they had been legally elected. On the other hand, if this Court decrees the members of Congerss should be elected from the various districts, when such persons present themselves to be sworn into office, the House would have the express power to determine whether or not they had been legally elected. In other words, under this provision of the Constitution, it is within the power of the

House, and not within the power of this Court to determine whether or not a person has been legally elected as a member of that body.

THE POWER TO DISTRICT A STATE FOR THE PURPOSE OF ELECTING REPRESENTATIVES IN CONGRESS IS VESTED IN THE LEGISLATURE OF THE STATE AND IN THE CONGRESS AND THE COURTS ARE, THEREFORE, WITHOUT POWER OR JURISDICTION TO DECLARE A STATUTE DISTRICTING A STATE UNCONSTITUTIONAL.

Section IV, of Article I, of the Constitution provides that the manner of holding elections for representatives "shall be prescribed in each state by the Legislature thereof, but the Congess may at any time, by law, make or alter such regulations."

Section III, Title 2, U. S. Code, Annotated, provides that the Legislature may district the state and that such districts must be contiguous, compact and of as nearly equal population as practicable.

It might be admitted that on the face of the statute and on the face of the census of 1930 that "the statute is not a substantial compliance with the provisions of the Act of Congress," but this is a question to be determined by the Legislature and its determination is final until Congress has acted. The Constitution gives the Congress specific authority to make or alter the regulations made by the State. The courts cannot interfere with the statutes en-

acted by the Legislature, nor with the Act of Congress in reference thereto.

If the questin is one for the courts, then the courts must be controlled by the facts as shown by the evidence and the question would arise as to whether the districts were compact.

Plaintiffs contend in the court below that they were not and the court held that they were compact. It might be possible to prove the shape and area of the districts. By an examination of the map in the record it will appear that District No. 1 is several times as long as it is wide. District No. 3 is very narrow at each end, wide in the middle and the length is several times its width. The 6th and 7th districts are both very irregular in their boundaries. The court below held these distircts were compact. Another court might hold the said districts are not compact, and yet, another might hold that one or more of such districts are compact and the others are not. In other words, they would get about as many decisions on this question as there were judges to hear the cause. In case the facts were submitted to juries the decisions would be multiplied by twelve.

The Act of Congress does not fix any time for the redistricting act to be enacted by the State Legislature. In the case of *People, ex rel vs. Voohis*, 222 N. Y., 494, it was held that the laws of New York, 1917, redistricting the state were valid, even though the Legislature redistricted the state in 1911, in pursuance of the Reapportionment Act of 1911.

Suppose the Act of 1917 had been attacked on the ground that the populatin of the districts were unequal. The census of 1910 would not have been evidence of the population in 1917. The court could not have had a census made for the purpose of determining the population and such fact could not have been determined in any other manner. The bill in the case at bar shows and the finding of fact by the court shows what the population of each district in the State of Mississippi was, as shown by the census of 1930. The law in controversy was passed in 1932. The census of 1930 was not proof of what the population was in 1932. If the question raised by this case is a question for judicial determination, then it would be necessary to allege and prove what the population was at the time the statute was enacted.

In the case of *Luther vs. Borden*, 7th How., page 1, the question at issue was whether or not a Constitution adopted by the people of Rhode Island in 1842, or a Constitution adopted in 1843 was the valid Constitution of the State of Rhode Island. This court, in an opinion rendered by Chief Justice Tanney, in discussing as to whether or not the validity of the Constitution in controversy was a question for the legislative department of the government or the courts, held as follows:

> "Besides, if the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the state to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the

United States to prescribe the qualifications of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision.

"And, if the then existing law of Rhode Island which confined the right of suffrage to freeholders is to govern, and this question is to be tried by that rule, how could the majority have been ascertained by legal evidence such as a court of justice might lawfully receive? The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions or judgment as to the freehold qualifications of the persons who voted. The law requires actual knowledge in the witness of the fact to which he testifies in a court of justice. How, then, could the majority of freeholders have been determined in a judicial proceeding?

"The court had not the power to order a census of the freeholders to be taken; *nor would the census of the United States of* 1840 *be any evidence of the number of freeholders in the State in* 1842. Nor could the court appoint persons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen, and bring him before the court to be examined. And if this were attempted, where would such an inquiry have ter-

minated? And how long must the people of Rhode Island have waited to learn from this court under what form of government they were living during the year in controversy?"

The population of the various districts is ever changing—some districts lose in population, while others gain. If the constitutionality of a statute is to be determined by the courts, on the facts at the time the case is tried, then a redisricting act might be constitutional at the time it is enacted and unconstitutional two years later when it is attacked in the courts. It might be unconstitutional when enacted and constitutional at the time it is tried in the courts.

A statute must be constitutional or unconstitutional. It cannot be valid one day and invalid the next. If this is not true, the act of 1902, redistricting the State of Mississippi, was certainly unconstitutional in 1930. The population of the State in 1930 was 2,009,821. There were eight districts. The average or ideal district would have had a population of 250,000. One district had only 184,000, another had 420,000.

The population of the districts was not equal at the time the Act was passed and has not been since such time, according to any of the census reports. The population of the State in 1900 was 1,550,000 and the average or ideal district would have had a population of 194,000. One district actually had a population of 162,000 and another 232,000.

If a statute is unconstitutional, it is unconstitutional *ab initio* and not merely after it is so declared by the courts. If the Act of 1932 is invalid, then the Act of 1902 was invalid and the State of Mississippi has not had a legal representative in Congress since 1902 and I dare say the same is true of every other state in the Union.

In June, 1929, Volume XLII of the Harvard Law Review, published an article written by Honorable Zachariah Chafee, Jr., on the subject of "Congressional Reapportionment." Said article is very interesting when read in connection with the questions at issue in this case. I quote therefrom, as follows:

> "No group of persons is more vitally concerned with the problem of Congressional reapportionment than the bar. Laws are inevitably affected by the composition of the law making body Loyal obedience to statutes depends largely upon the widespread conviction that they were justly enacted, and this conviction is seriously weakened by an unfair allotment of representatives, Taxation with under-representation is only somewhat less unacceptable than taxation without representation. In recognition of these principles, every previous reapportionment of the national House of Representatives was made before the close of a second year after a census. Yet Congress has failed to make a new reapportionment based on the census of 1930. The House is still organized according to the census of 1910, so that the recent great shifts of population, notably to California and the centers of the automobile industry, remain disregarded in Congress, and in the Electoral College as well. In many states the situation result-

ing from neglect or unfair discrimination in the demarcation of legislative districts is perhaps even worse. We are permitting the streams of legislation to become poisoned at the source.

"The long failure of Congress to perform its constitutional duty of reapportionment invites attention to three questions: First, the possibility of compelling Congress to act and the legal consequences of its continued inaction; secondly, the validity of the proposed enabling act, establishing a permanent scheme of apportionment to be put in effect by the president or some other high official soon after the census of 1930 and after subsequent enumerations, whenever Congress itself fails to reapportion.

1.

THE LEGAL CONSEQUENCES OF FAILURE TO REAPPORTION.

"The failure of Congress to agree upon a plan for revising the last apportionment of 1911 may possibly continue beyond the census of 1930. May the courts then compel action by Congress, or declare that its inaction renders invalid not only legislation but also presidential elections carried out under the obsolete arrangement of membership in the House and the Electoral College?

"Congress is under a mandatory constitutional duty to reapportion. But the violation of such a duty does not always confer power upon the courts to compel its peformance. Several clauses of the Constitution impose what may be called imperfect obligations. They define the duty but withhold the sanction. Thus, a fugitive from justice in one state is required to be delivered upon demand of

its governor if he is found in another state, but the fulfilment of this obligation is left entirely to the authorities of the second state and cannot be judicially enforced. Again, the United States guarantee to every state a republican form of government, but it is for Congress, not the courts, to decide whether any novel institution in a state is unrepublican. The members of the House of Representatives are to be chosen by the electors qualified to vote for the most numerous branch of the state legislature, but if there be no provision in the state constitution for such a legislature, no Congressmen can be chosen. It seems probable that the duty to reapportion is a similarly imperfect obligation, and that the courts cannot compel a law for that purpose any more than they could compel Congress to impose taxes in order to pay judicial salaries if Congress preferred to leave the treasury empty.

"This position is supported by the recent Illinois case of *Fergus v. Marks*, which arose out of the failure of the Illinois Legislature to reapportion senatorial districts since 1901, although its constitution requires decennial revision. The petition of a citizen and a taxpayer for a writ of mandamus to compel the members of the legislature to meet and apportion the state in accordance with the constitution was denied on the ground that the judiciary could not exercise control over a co-ordinate branch of the government. The Supreme Court of the United States would be equally reluctant to issue a mandamus against all the members of the Senate and the House of Representatives.

"As a natural consequence, the Supreme Court would also probably decline to hold that leg-

islation by an unrevised House of Representatives or elections by an unrevised Electoral College were invalid. After the defeat just described, the same Illinois taxpayer, in *Fergus v. Kenny*, asked leave to file a bill in equity to restrain the state treasurer from paying the salaries and expenses of the next Legislature on the ground that its members would not be validly elected. He lost again. The court said that the legislature had uncontrolled discretion as to the performance of its mandatory duties. The under-represented population of Chicago must console itself with the words of Mr. Justice Holmes:

> " 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts'. (*Missouri, K. & T. Ry. v. May*, 194 U. S. 267, 270, 1904).

"If the validity of the continuance of the Congressional apportionment of 1911 were similarly tested, it seems probable that the Supreme Court of the United States would declare that reapportionment is a political question with which it has no concern. An ingenious argument to the contrary has been made by Professor W. S. Meyers, of Princeton University, who suggests that a close presidential election could be successfully contested in the courts on the ground that a different result would have been reached if the distribution of the Electoral College had been altered by a proper apportionment. Such an argument would carry us very far. It must rest on the assumption that the apportionment of 1911 became invalid at some definite date, for instance, March 4, 1923, when the first congress chosen after the 1920 census adjourned. It would then follow that all legisla-

tion enacted since that date was void and could be disobeyed with impunity. Furthermore, no subsequent congress could make a new apportionment since none could be validly elected. The courts themselves would have to take over the function of reapportioning Congress, and decide the size of the House and the comparative merits of competing schemes. They would then have to order the redistricting of the states and a new election of presidential electors and representatives, and see to the enforcement of their decrees. If the Congress elected under the old apportionment persisted in sitting, the persons elected under court orders would have to gain possession of the chamber by judicial process if they could find marshals to execute it. Such a picture is a sufficient answer to this interesting argument.

"Yet, although no legal consequences will follow from the continued delay of Congress in performing its constitutional duty, the practical consequences will become increasingly undesirable. In a republic, laws gain their chief sanction from the consent of the governed. As soon as the feeling becomes widespead that these laws are the result of the violation of the Constitution by those who are most clearly bound to respect it, the moral support of law will gradually weaken. Although it cannot be compelled, reapportionment immediately after the 1930 census is a political obligation. Fortunately, Congress has recently shown a renewed determination to legislate on this subject. In so doing, it is doubly important that a satisfactory statute be enacted, as a permanent solution of a long standing federal problem and as an effective example of fairness to the states."

The article then continues by giving the various methods that have been used by Congress when reapportionment acts were passed by that body.

Article 1, Section 4, paragraph 1, of the Constitution gives to Congress absolute power in reference to the manner of holding elections for Representatives. The districting of a state is a legislative power and not a judicial power.

The power is granted to Congress and the courts have no jurisdiction thereof.

In the case of *Veazie Bank v. Fenno*, 75 U. S. 333, 19 L. Ed. 482, text page 487, the Court held as follows:

> "It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.
>
> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

The Constitution authorizes the President of the United States to appoint postmasters by and with the ad-

vice and consent of the United States Senate. In the case of Myers vs. U. S., 272 U. S. 52, 71 L. Ed. 160, the Supreme Court of the United States held that this power was an executive power and that the President had the right to remove a postmaster so appointed with the consent of the Senate.

It appears, from a careful study of these opinions, that when a power is given to one branch of the federal government, the other branches of government have nothing to do with or any control over such power.

The Constitution gives to Congress the right to control the elections of its members and, therefore, the courts cannot have any power over Congress.

In the case at bar, if the State of Mississippi has not been redistricted in accordance with the Act of Congress, then Congress, and Congress alone, may correct this error. The Court has no jurisdiction to do so.

In the case of *Springer vs. Philippine Islands*, 272 U. S. 189, 72 L. Ed. 845, the Court held as follows:

> "It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall

within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

"Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Myers v. United States*, 272 U. S. 52, 71 L. ed. 160, 47 Sup. Ct. Rep. 21."

In the case of *Wilson vs. Shaw*, 204 U. S. 24, this Court held as follows:

"These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the govenment in its action within the limits of the Constitution. *Jones vs. United States*, 137 U. S., 202, 34 L. ed. 691, 11 Su. Ct. Rep. 80, and cases cited in the opinion: *Re Cooper*, 143 U. S. 472, 499, 503, 36 L. ed. 232, 240, 242, 12 Sup. Ct. Rep. 453."

In *Jones vs. U. S.*, 137 U. S. 202, the rule is again stated in the following language:

"Who is the soverign, de jure or de facto, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other

officers, citizens, and subjects of that government. This principle has always been upheld by this court and has been affirmed under a great variety of circumstances. *Gelston v. Hoyt*, 16 U. S. 3 Wheat, 246, 324 (4: 381, 401); *United States v. Palmer;* Ia. 610 (471); The Divina Pastora, 17 U. S. 4 Wheat, 52 (4: 512); *Foster v. Neilson*, 27 U. S., 2 Pet. 253, 307, 309 (7: 415, 433, 434); *Keene v. McDonough*, 33 U. S., 8 Pet. 308 (8: 955); *Garcia v. Lee*, 37 U. S. 12 Pet.., 511, 520 (9: 1176); *Williams v. Suffolk Ins.* Co. 38 U. S. 13 Pet. 415 (10: 226); *United States v. Yarba*, 68 U. S. 1 Wall, 412, 423 (17: 635, 637); *United States v. Lynde*, 78 U. S. 11 Wall, 632, 638 (20: 230, 232). It is equally well settled in England. The Pelican, Edw. Adm. Appx. D., *Taylor v. Barclay*, 2 Sim. 213; *Emperor of Austria v. Day*, 3 Deg. F. and J., 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, L. R. 36, Ch. Div. 489, 497; *Republic of Peru v. Dreyfus*, L. R. 38 Ch. Dic. 348, 356, 359."

In the case of *Taylor v. Beckham*, 178 U. S. 548, this court again defines the limit of the power of the courts in the following language:

"As remarked by Chief Justice Tanney in *Luther v. Borden*: 'The high power has been conferred on this court of passing judgment upon the acts of the state soverignties, and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And, while it should always be ready

> to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums'."

Article XIV, Section 2, of the Constitution of the United States provides that if a State denies the right of suffrage to any of the male inhabitants being twenty-one years of age, and citizens of the United States, the basis of representation in such state shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Now, suppose a tax payer, qualified elector and candidate for Congress were to file a bill in the Federal Court in equity, and allege that one-sixth of the male inhabitants over the age of twenty-one years in the State of Mississippi were denied the right of suffrage, and pray that the Court enjoin the election of seven Congressmen because such denial by the State of Mississippi is in conflict with such section. Would this Court entertain jurisdiction thereof? Certainly not, it is a power vested in Congress and this Court would not exercise any power over Congress.

Article IV, Section 4, Constitution of the United States, provides as follows:

> "The United States shall guarantee to each State in the Union a republican form of government."

In the case of *Luther v. Borden*, 7 How., page 1, the facts appeared to be substantially as follows:

The Constitution of Rhode Island at the time it joined the Union did not provide any mode by which the Constitution might be amended. In 1841, a portion of the people of said State held meetings, formed associations and elected delegates to a convention. This convention adopted a constitution which was submitted to and approved by the people. In 1843 the charter government, which did not acquiesce in these proceedings, framed a new constitution and put it into operation. Plaintiff in said cause contended that the Constitution of 1841 was valid and that the Constitution of 1843 was invalid. The General Assembly of the State of Rhode Island recognized the last mentioned Constitution.

The Court in deciding said case held as follows:

> "Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the Political Department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more

than one of the cases evidence was offered on the part of the defense similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavoring to support it.

"But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the Judicial Department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses."

In the case of *Mountain Timber Co. v. Washington*, 243 U. S. 219, this Court held as follows:

"Two of the constitutional objections may be disposed of briefly. It is urged that the law violates Section 4 of Article 4 of the Constitution of the United States, guarantying to every state in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress, and not to the courts. *Luther v. Borden*, 7 How. 1, 39, 42, 12 L. Ed 581, 597, 599; *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224; *Kierman v. Portland*, 223 U. S. 151, 56 L. ed. 386, 32 Sup. Ct. Rep. 231; *Marshall v. Dye*, 231 U. S. 250, 256; 58 L. ed.

206, 34 Sup. Ct. Rep. 92; *Ohio ex rel Davis v. Hildebrandt*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708."

In *State of Ohio vs. Hildebrandt*, 241 U. S. 565, it appears that the Constitution of the State of Ohio provided for a referendum and recall; that after said section of the Constitution became effective the State Legislature redistricted the State. Under the referendum clause of the Constitution a vote was called and the redistricting act declared void. It was contended that the referendum was repugnant to Section 4, Article I of the Constitution. The Court held as follows:

> *"To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to Section 4, of article 1 of the Constitution and hence void, even if sanctioned by Congress, because beyond the constitutional authority of that body, and hence that it is the duty of the judicial power so to declare, we again think the contention is plainly without substance."*

In the case of *Marshall vs. Dye*, 231 U. S. 250, this Court held as follows:

> "The contention mainly urged by the plaintiffs in error of the denial of Federal rights is that the jurgment below is in contravention of article 4, Section 4 of the Constitution of the United States, which provides that the United States shall guarantee to every state in the Union a republican form of government. In *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S.

118, 56 L. ed. 377, 32 Sup. Ct. Rep. 224, this court had to consider the nature and character of that section, and held that it depended for enforcement upon political and governmental action through powers conferred upon the Congress of the United States."

It will, therefore, be seen from these decisions of the Court, and the other decisions cited therein, that Article IV, Section 4 of the Constitution guarantees to the states a republican form of government. The Court holds that this power is vested in Congress, or the political department of the government, and the courts are bound by the acts of Congress in reference thereto.

Article 1, Section 4, the section in controversy in this case, clearly gives Congress the right to redistrict the states for the purpose of electing representatives in Congress. The Congress is, therefore, supreme in this field and the Court is without jurisdiction to hold an act of Congress or an act of the State Legislature unconstitutional.

If the power is vested by the Constitution in Congress in such cases as the case at bar, then the Congress can correct the inequalities of state legislation. Said section 4, Article 1, grants to Congess the power to alter the state regulations or to make new regulations. This remedy is complete and effective.

If the power is vested in the Courts, then the only judgment such courts could render would be to declare the state act null and void. It could not make a new law that would be in accord with the Constitution and statutes.

There is nothing in the cases of *Smylie vs. Holm*, 284 U. S. 616, 52 Sup. Ct. Rep. 266; *Koenig vs. Flinn*, 52 Sup. Ct. 403, or *Carroll vs. Becker*, 52 Sup. Ct. 402, recently decided by this Court, that is in conflict with the views expressed in this brief.

Each of said suits was begun in the State Court by petition for writ of mandamus, and brought to this Court by appeal from the various state supreme courts. *The question of equitable jurisdiction to prevent a deprivation of a political right did not arise.*

The question presented in each of said cases was whether the state legislature *had acted* and not whether *an act* of the legislature *was valid*. The Court held that the legislature had not acted.

V.

HOUSE BILL NO. 197, REGULAR SESSION OF THE LEGISLATURE OF 1932 DOES NOT CONTRAVENE ANY OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES OR THE LAWS THEREOF, BECAUSE SECTION 4, ARTICLE I, OF THE CONSTITUTION AND THE ACT OF CONGRESS OF 1911 ARE DIRECTORY AND NOT MANDATORY.

In the cases of *Smylie vs. Holm, supra, Koenig vs. Flinn, supra,* and *Carroll vs. Becker, supra,* this Court, while not expressly so deciding, recognized that the provisions of the Constitution and statutes in controversy were directory merely and not mandatory. Neither the

constitution nor the statutes provide that the election of representatives in Congress shall be from the State at large in the event the State fails to enact a redistricing act. However, this Court held such to be the rule. Now, if the Court had been of the opinion that said provisions were mandatory it would, of necessity, have held that the State would be without representation until the State was redistricted.

In the case of *Wood vs. State*, 142 So. Rep. 747, not yet officially reported, when the Supreme Court of Mississippi had before it the same statutes and facts as are involved in this case, Justice Ethridge filed a specially concurring opinion, concurred in by Justice Anderson. This proposition is so learnedly reasoned and is so well supported by the decisions of this Court, as well as by decisions of courts of other jurisdictions, I take the liberty of quoting said opinion in full:

"ETHRIDGE, J. (specially concurring).

The PER CURIAM opinion, in which I fully concur, decides all that is necessary to dispose of this case. But, in view of the public interest, and the desirability of knowing the law pertaining to the merits of the case, and following the precedent of *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60, I desire to submit the following views.

"The basis upon which the mandamus in the case at bar is sought is that the redistricting act is void because of inequality in population in the several districts, and because it is in conflict with section 3 of the Act of Congress of August 8, 1911 (2 USCA § 3), reading, in part, as fol-

lows: 'In each State entitled under this apportionment to more than one Representative, the Representatives to Congress shall be elected by districts composed of contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.' 37 Stat. 14.

"By an analysis of this statute, it will be seen that it is directory, and especially as to the feature directing districts to be contiguous, compact, and of nearly equal population. Congress itself did not undertake to create districts, nor did it undertake to prohibit a variance of more than a given number of inhabitants in each district, so that there is no statement by which the judiciary can measure what will be an equal number of inhabitants, or what would constitute a compact territory.

"The one mandatory feature, if it can be said to be mandatory, is that the election be by districts, and that no district shall elect more than one Representative. It was clearly the dominant purpose and desire of Congress that the election should be by districts, and that there should be as many districts as Representatives allowed the state in Congress. The number of Representatives is fixed by the congressional act, and to grant a mandamus, or declare the act void, would be to thwart the dominant purpose of Congress in directing the state to be divided into districts. It is true that if Congress had desired to enact in detail and by specified territory and population how districts should be laid off, it could have so done, but as Congress did not

express its own judgment as to what territory should compose the districts, or what population each district should contain, it necessarily left it to the legal discretion and judgment of the state Legislature as to what constitutes a contiguous and compact terriory, and, the discretion being so left by an act of Congress, this court cannot control that discretion. It cannot substitute its own judgment for that of the legislative body. It seems to me that there can be no doubt about the act being directory. *Hubbert v. Campbellsville* L. Co., 191 U. S. 70, 24 S. Ct. 28, 48 L. Ed. 101; *French v. Edwards*, 13 Wall, 506, 20 L. Ed. 702; 2 Words and Phrases, Second Series, 53; *Lang v. Harrison County*, 114 Miss. 341, 75 So. 126; *Rosenstock v. Board of Sup'rs of Washington County*, 112 Miss. 124, 72 So. 876. It is clearly directory in reference to the kind of districts that shall be created.

"We know that, in dealing with subjects of this kind, there are many factors entering into the minds of legislators in creating districts. However much we might be disposed to differ with the Legislature as to the propriety and wisdom of the act, it is a question for the Legislature itself to determine, and the court will not undertake to control the Legislature in its respective separate department of state government.

"It is to be regretted that there is considerable inequality of population, but no one believes that any district can be created that is absolutely equal in population and shape to every other district. This state has never had such a system of districts, nor has any other state been able to lay off congressional districts with exact equality as to size, shape, and population.

"We should subordinate the secondary considerations of the act to the primary or dominant ones. It is clearly more desirable that there should be districts than that they should be equal. In our own state, for instance, on the west boundary is the great Mississippi river country subject to overflow, much of the territory of the state lying within the area so subject. Levee protection is the chief benefit of government to this area. They might subordinate other things to flood protection. A portion of the state borders on the Gulf of Mexico, and is interested in port improvement and commercial enterprises. Other sections of the state, removed from rivers and harbors, have no particular interest in such projects, being chiefly engaged in other pursuits. Each group having one Representative is represented more than it would be if Congressmen shall be elected from the state at large. Under the bill as drawn, each district of the state is assured of one Representative to speak for it in the national House of Representatives. Should the circuit court be followed, this assurance will be destroyed, as all the Congressmen might be elected from one territory to the great detriment of the rest of the people of the state.

"No doubt the Legislature gave much time to the consideration of this redistricting bill. It seldom happens that everybody can be pleased. The journals show a number of bill were introduced, having different divisions of territory and population from the one under review. This shows a diversity of opinion in the Legislature on the subject. For this reason also, I think the public interest can be best served by not disturbing its finding. There was no state constitutional restriction upon the Legislature in creating districts, and therefore the Legislature was in full posses-

sion of power and discretion vested in it by section 4, art. 1, United States Constitution. The Constitution having given Congress the power to make laws and alter laws, by implication, necessarily excludes every other power than Congress from disturbing what the state Legislature has enacted. Neither the State nor the Federal Constitution imposes any restriction upon how the state shall act in the matter, nor of how Congress shall act upon the matter, except that it shall act in the exercise of the law-making methods, and its regulations must be lawful. Expressio unius est exclusio alterius. This maxim is of universal statutory construction. *United States v. De la Maza Arredondo*, 6 Pet. 691, 8 L. Ed. 547. When an expression is used in a general statute, it excludes all other than this expression. *Kendall v. U. S.*, 107 U. S. 123, 2 S. Ct. 277, 27 L. Ed. 437. What a statute allows to be done in a particular mode conclusively negatives any other mode. *Raleigh & Gaston R. R. Co. v. Reid*, 13 Wall, 269, note, 20 L. Ed. 570. Where the Legislature grants authority to do a thing in a certain way, by necessary implication it prohibits the doing of it in any other way. *Stephans v. Smith*, 10 Wall. 321, 19 L. Ed. 933.

"From this section it will be seen that the framers of the Constitution were dealing with the elective branch of the national government; the one branch of the government that was given to the people themselves in elections to be held for that purpose.

"It was never contemplated that either the judicial or executive departments should have any control over the election of the people's representatives, the only direct touch

and control that the people have over their government. The framers of this government were careful to divide it into three departments, and to have these departments separate and distinct; and, not being content to leave the matter entirely in the states' discretion, for fear the states might fail to act in electing their Representatives, it was considered proper to vest some control in the national authorities. It was also considered proper to vest this control in the national Legislature, and, having named the party who would correct the act of the state when it needed correction, the control cannot be delegated to any other agency. It is true every state constitutional provision is subject to the restraint of the Federal Constitution when it clashes with the Federal Constitution. Construction of the State Constitution by a state court is, of course, a different thing from the construction of the Federal Constitution by a state court. It would be permissible for the legislative power to lay restraints upon themselves, or the people could do so in Constitutional Convention assembled. This was held in the case of *Ohio v. Hildebrant*, 241 U. S. 565, 36 S. Ct. 708, 60 L. Ed. 1172, in which the Ohio court held that the referendum provisions of the State Constitution were a part of the legislative power, and that elections in pursuance thereof were valid so far as that power of the Supreme Court of the United States was concerned. To the same effect is the case of *Mountain Timber Co. v. State of Washington*, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642.

"The power to control the states being vested in Congress by express language in regard to the time and manner of holding elections for Congressmen makes it a legislative

or political power which is separate from, and independent of, the other departments of government. The determination of that question is exclusively for Congress, and state enactments are valid until Congress has acted, and so far as they do not conflict with the enactments of the United States Congress. In other words, if Congress has acted, and the state has acted, both enactments stand if not in conflict, and if they do conflict, the state being subject to limitations, the Congress is supreme. *Re Siebold*, 100 U. S. 371, 25 L. Ed. 717; *Re Yarbrough*, 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274; *Re Coy*, 127 U. S. 731, 8 S. Ct. 1263, 32 L. Ed. 274; *United States v. Mosley*, 238 U. S. 383, 35 S. Ct. 904, 59 L. Ed. 1355.

"The power conferred on Congress by the Constitution cannot be conferred upon another department. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377; *Re Garland*, 4 Wall. (71 U. S.) 333, 18 L. Ed. 366.

"Under the provisions of the Federal Constitution by which the United States guarantees to every state a republican form of government, the courts have no power to determine whether a particular government is republican in form or not; that question being entirely for the political department of government. *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Pacific States Telephone Co. v. Oregon*, 223 U. S. 118, 32 S. Ct. 224, 56 L. Ed. 377; *Georgia v. Stanton*, 6 Wall. 49, 18 L. Ed. 723-725, where it is said: 'This distinction results from the organization of the government into the three great departments, Executive, Legislative, and Judicial—and from the assignment and limitation of the powers of each by the Constitution. The judicial power

is vested in one Supreme Court, and in such inferior courts as Congress may ordain and establish; the political power of the government in the other two departments. The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. *New York v. Conn.*, 4 Dall. 4 (1 L. Ed. 717); *Nabob of Carnatico v. E. I. Co.*, 1 Ves. Jr. 375; (S. C.) 2 Ves. Sr. 446, 447; *Cherokee Nation v. Georgia*, 5 Pet. 1 (8 L. Ed. 25). * * * The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of Congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state by depriving it of the means and instrumentalities whereby its existence might, and otherwise would, be maintained. This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of Congress; which, it is charged, if carried into effect by the defendants, will work this destruction. But, they are grievances, because they necessarily and inevitably tend to the

overthrow of the state as an organized political body. They are stated, in detail, as laying a foundation for the interposition of the court to prevent the specific execution of them; and the resulting threatened mischief. So in respect to the prayers of the bill. The first is that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the state, which is or may be directed or required of them, by or under the two acts of Congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed. That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights, for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court. It is true, the bill in setting forth the political rights of the state, and of its people to be protected, among other matters, avers that Georgia owns certain real estate and buildings therein, State Capitol, and Executive Mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the

state, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed, the case, as made in the bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us'.

"See, also, *Mississippi v. Johnson*, 4 Wall. 475, 18 L. Ed. 441, 500, where the court said: 'The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that

court? These questions answer themselves. It is true that a State may file an original bill in this court. And it may be true, in some cases, that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us'.

"It seems to me that no more important right can be conferred than the one in this case. It gives the people of the state a representative form of government, provided Congress enforces the regulations; but even should the state, or some one in its name who has seized the political power and usurped all the powers of the state, enact a measure not in conflict with the enactments of Congress, then the courts would be powerless to intervene.

"Again, the Federal Constitution provides that a person who has committed a crime in one state, and is found in another state, on demand of the executive of the state where the crime was committed, may be arrested by the executive of that other state, and delivered to the state where the crime was committed. Under this section of the Constitution, the courts cannot compel compliance. *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717; *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287.

"Questions of a political nature are exclusively for the determination of Congress.

"It belongs to the political department to determine when belligerency shall be recognized, and its action must be

accepted according to the terms and intentions expressed. *United States v. The Three Friends*, 166 U. S. 1, 17 S. Ct. 495, 41 L. Ed. 897.

"The federal Supreme Court has no supervising power or control over the political branch of the government in its action within the limits of the Constitution. *Wilson v. Shaw*, 204 U. S. 24, 27 S. Ct. 233, 51 L. Ed. 351.

"For the reasons named, I am of opinion that it was error to have granted the writ of mandamus, and that the judgment should be reversed, and the petition dismissed."

OPINION OF THE COURT BELOW

The opinion of the majority of the Court below in holding that this Court has jurisdiction and that the injunction ought, therefore, to issue, is based upon the decision of this Court in the case of *United States vs. Mosley*, 238 U. S. 383. The suit in said case was an indictment under Section 19 of the Criminal Code, Act of March 4, 1909, Chapter 321, 35 Statutes at Large 1008; Compiled Statutes 1913, Sections 10165, 10183.

The indictment charged certain state election officials with a conspiracy to omit the returns of certain precincts in an election for a member of Congress from the count and returns to the State Election Board. The Court held that the statute was constitutional, and held that a voter was entitled to have his vote counted. The pertinent part of the opinion is as follows:

"It is not open to question that this statute is

constitutional and constitutionally extends some protection, at least, to the right to vote for members of Congress. *Ex parte Yarbrough,* 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. 152; *Logan v. United States,* 144 U. S. 263, 293, 36 L. ed. 429, 439, 12 Sup. Ct. Rep. 617. We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."

In the case of *Ex Parte Yarbrough,* 110 U. S. 651, cited in the *Mosley case, supra,* this Court held as follows:

"In such cases this 15th article of Amendment does *proprio vigore,* substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right.

"In the case of *U. S. v. Reese,* so much relied on by counsel, this court said in regard to the 15th amendment that 'It has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. *That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude.*' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.

"The exercise of the right in both instances is guaranteed by the Constitution and should be

kept free and pure by congressional enactments whenever that is necessary."

In the case of *Logan vs. United States*, 144 U. S. 263, also cited in the Mosley case, this Court held as follows:

> "Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political right of a voter to be protected from violence while exercising his right of suffrage under the laws of the United States; and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent."

In each of these three cases it appears that the question involved in said cases was the provision of the fourteenth amendment to the Constitution. This amendment provides that a person shall not be denied the right of suffrage on account of race, color or previous condition of servitude.

The statutes construed in said cases were statutes making it a criminal offense to conspire against or to in any way interfere with a person's right to vote on account of his race, color or previous condition of servitude.

None of these questions is involved in the case at bar.

The dissenting opinion of Judge Holmes has not yet been officially reported, and is printed in this brief as Appendix A. The opinions cited by Judge Holmes have been cited and discussed elsewhere in this brief.

THE DECISIONS OF THE STATE COURT

The attorneys for appellee in this case, representing C. E. Brumfield, brought a suit in the Chancery Court of Pike County, Mississippi.

Practically the same facts were alleged and the same relief prayed for as in the case at bar. This case was appealed to the Supreme Court of Mississippi. Its opinion has not yet been officially reported, but is published in Advance Sheet No. 5, Volume 142 Southern Reporter, a copy of which is filed herewith.

The attorneys for appellee in this case, representing Hugh Gillespie, District Attorney, brought a suit in the name of the State against Walker Wood in the Circuit Court of Hinds County, Mississippi, for a writ of mandamus. Practically the same facts were alleged and the same relief petitioned for as in the case at bar. The opinion of the Supreme Court of Mississippi has not yet been officially reported in this case, but is found published in Advance Sheet No. 5, Volume 142 Southern Reporter, a copy of which is filed herewith.

CONCLUSIONS

I, therefore, most respectfully submit that the decree of the District Court should be reversed and the original bill dismissed for the following reasons, to wit:

1. The plaintiff in the Court below had a plain, adequate and speedy remedy at law.

2. A Federal Court of Equity has no jurisdiction to enforce a political right.

3. The right or power to district a state for the purpose of electing representatives in Congress is vested in Congress and the State Legislature, and the Courts have no jurisdiction thereof.

4. The provisions of Section 4, Article 1 of the Constitutin are directory and not mandatory.

SUPPLEMENT

POINT I.

ASSUMING THAT CONGRESS HAD AUTHORITY TO PROVIDE THAT CONGRESSIONAL DISTRICTS SHOULD BE COMPACT, CONTIGUOUS, AND AS EQUAL IN INHABITANTS AS PRACTICABLE, CONGRESS BEING THE SOLE JUDGE THEREOF, HAS CONSTRUED THE STATUTE AS NOT BEING MANDATORY BUT DIRECTORY, AND AS AN ADMINISTRATIVE MATTER, EXCLUSIVELY FOR THE STATES.

We reiterate that, as has been previously stated, the question as to the compactness and equality of number of inhabitants, is a Congressional-political, and not a judicial question.

Certainly the Congress could not be required to pass a reapportionment bill. *Yost v. Dallas County,* 236 U. S. 50; and although it might be the duty of the Governor of a State to honor the requisition of the executive of another state, such action could not be judicially required. *Kentucky v. Dennison,* 24 How. 66.

Paragraph 1, Section IV, Article I, of the Constitution of the United States, is in the following language:

> "The Time, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chosing Senators."

In pursuance of said provision in the Constitution of the United States, following the census of 1910, and effective August 8, 1911, the Congress passed the Act under review, providing that Representatives to Congress should be elected by districts, composed of contiguous and compact territory, and containing, as nearly as practicable, an equal number of inhabitants.

For a period of fifty years after the adoption of the Federal Constitution, Congress was content with fixing the number of Representatives, and apportioning them among the States.

In 1842, the Congress, for the first time, asserted the right to require members of the House of Representatives to be elected by districts, composed of contiguous territory.

Following the apportionment had in 1850, the Congress made no provision for election by districts.

In 1862, the plan of electing Representatives by districts was again invoked, and the apportionment act provided that the election should be by districts composed of contiguous territory.

Following the census of 1870, the next decennial apportionment was in 1872, and not only did the act require members of the House of Representatives to be elected by districts, composed of contiguous territory, but it contained the further provision that such districts should contain. as nearly as practicable, an equal number of inhabitants.

The same provision was found in each decennial apportionment act, from 1872 to, and including the present act, of 1911, which act still remains in force.

Some doubt was expressed as to whether or not, under the Constitution of the United States, the Congress had any authority to provide the boundaries of Congressional districts.

Following the enactment of the apportionment act of 1842, Congressional elections were held in several states from the state at large, notwithstanding the positive provision of Section 2, of that act, providing for the election of members of the House of Representatives from districts. In a number of states, including Mississippi, members of the House of Representatives were elected from the state at large. Contests were instituted before the House of

Representatives, and a majority of the Committee on Elections held that Congress was without power or authority to require members of the House of Representatives to be elected from districts.

This view was ably supported in a lengthy report submitted by Hon. Stephen A. Douglas, of Illinois. See McCrary on Elections, 4th Edition, Sections 191, 192.

The members of Congress from the State of Mississippi, elected from the state at large, were, therefore, seated, notwithstanding Section 2 of the Act of 1842, providing that they should be elected from districts.

The report of the Committee will be found First Volume, Bartlett on Contested Elections, 47-55.

This ruling was adhered to in the later case of *Phelps v. Cavanaugh*. See Bartlett on Contested Elections, page 248.

The matter was again presented to the House of Representatives in the case of *Davidson v. Gilbert*, at the second session of the Fifty-sixth Congress.

The Committee, in effect, stated that if Congress had the power to regulate the boundaries of Congressional districts, that the right should not be exercised, but that the question should be left, as an administrative feature of state government.

The question was again reviewed in the Sixty-first Congress, in the case of *Parsons v. Saunders*. The con-

test arose over a redistricting act, enacted by the Legislature of the State of Virginia.

The Committee in that case disagreed with the report of the Congressional Committee, in the case of *Davidson v. Gilbert*, and held that Congress did have the right and power, under the provision of the Constitution hereinbefore set out, to provide the boundaries of Congressional districts, etc.

We will endeavor to obtain, for the benefit of the Court, and file herewith, a copy of the report of the Congressional Committee on Elections, in that case.

Notwithstanding, however, the asserted right of Congress to legislate upon the subject matter, it elected not to take action, and permitted the member to retain his seat.

In other words, the House of Representatives construed the statute as being not mandatory, but directory, and that the question of boundaries, etc., of Congressional districts was an administrative feature, which should be left to the states.

It must be borne in mind that the House of Representatives of the United States then had, and now has Congressional machinery for the purpose of deciding, and giving effect to its decision in such cases. See Chapter 7, Title 2, U. S. C. A. Annotated, on Contested Elections.

Since the before mentioned date, while the House of Representatives has affirmed its right to pass the act, it

being the sole judge thereof, it has left the question to the Legislatures of the various states. The result has been that Congress has not required either contiguity, compactness or equality in the number of inhabitants of Congressional districts.

We refer the Court to the Congressional Directory, third session, Sixty-second Congress, beginning on page 407 will be found a map of Congressional districts, made following the 1910 census.

The districts were not compact, and the same may be said as to equality of number of inhabitants. We will illustrate this by a few instances taken from state legislative apportionment acts, following the census of 1910, and the Congressional Act of 1911.

In the State of California, the smallest district had a population of 184,274; the largest 504,131.

In Alabama, the smallest district was composed of 193,958 inhabitants; the largest of 301,945.

In Missouri, 142,621 in the Eighth District, 416,389 in the Tenth District.

In North Carolina, 170,775 in the Third District, 330,-474 in the Fifth District.

In Ohio, 156,636 in the Fifth District, 367,970 in the Twenty-first District.

The same may be said of state redistricting acts, following the census of 1930.

The State of Alabama has one district with 250,000 inhabitants; another district with 450,000 inhabitants.

South Dakota has one district with 200,000 inhabitants; another with 650,000 inhabitants.

Michigan has one district with 225,000; another with 400,000 inhabitants.

The State of California has one district with 165,000; another with 350,000 inhabitants.

In the State of Ohio, the smallest district has 168,281 inhabitants, and the largest 633,818.

Pennsylvania's smallest district has 125,332 inhabitants, and the largest has a population of 445,109.

In the State of Tennessee, the smallest district is 195,000, and the largest 380,000.

Congress having authority to pass the Act, the action of the House of Representatives, in construing the Act, as not being mandatory, but directory, and embracing a matter which should be left to the Legislatures of the respective states, rests upon solid ground, which is especially applicable to the present case.

The reason for the passage of the Act providing for compact, contiguous districts, of equal number of inhab-

itants, as near as practicable, was doubtless to prevent what is known as gerrymandering, a practice described as follows:

> "Its origin has been described as follows: 'John Fiske in his Civil Government in the United States . . . . says that in 1812, when Gerry was governor of Massachusetts, the Democratic state legislature (In order, according to Winsor, to secure an increased representation of the Democratic party in the state senate) 'redistributed the districts in such wise that the shapes of the towns forming a single district in Essex county gave to the district a somewhat dragon-like contour. This was indicated upon a map of Massachusetts which Benjamin Russell, an ardent Federalist and editor of the Centinel, hung up over the desk in his office. The painter, Gilbert Stuart, coming into the office one day, and observing the uncouth figure, added with his pencil a head, wings, and claws, and exclaimed: "That will do for a salamander". "Better say a gerrymander", growled the editor; and the outlandish name, thus duly coined, soon came into general currency'." 2 A. L. R. 1337.

The Act was intended to prevent one of the great political parties from gaining an unconscienable advantage over another; was intended to prevent discrimination on account of race, color, or previous condition of servitude, and it is a matter of interest to note that the enactment of the Act, in its present form, followed the adoption of he Fifteenth Amendment to the Constitution of the United States.

In the Mississippi redistricting act, under review, there is no contention that the effect will be either to give one

political party an advantage over the other, or that it will in any manner discriminate against any race of people, on account of color, previous condition of servitude, or in any other way.

Since the power to determine the election and qualifications of its members is one for the House of Representatives, in the case of a wilful failure on the part of the state, in establishing Congressional districts, to observe the terms of the Act of Congress, to the extent that the spirit of the Act is violated, then Congress could resume its functions, and entertain a contest, and determine the right of the persons, claiming to be elected, to take their seats in the House of Representatives.

This further thought must be borne in mind—The Act of Congress requires that the district be compact, contiguous, and as nearly as practicable, of equal number of inhabitants.

In view of the fact that under the terms of the statute emphasis is laid upon the words "compact" and "contiguous" and they are given just as much importance as the provision in respect to the equality of number of inhabitants, we respectfully submit that taking the entire provision together, the same is hardly susceptible of judicial determination. In order to produce a compact, contiguous district it might be necessary to make the number of inhabitants inequal. Or, in order to make the districts equal as to number of inhabitants it might be necessary to destroy their compact contiguity. Your Honors must bear in mind that Congress probably considered that there were other things

which the state would have to take into consideration, than the mere question of a mathematically equal distribution of the inhabitants. The question of a Legislative redistricting act involves a great many considerations. There has to be taken into consideration the ethnology of the territory; the homogeneousness of the peoples; the commercial industries, and industrial activities of various parts of the state. Congress knew that the redistricting act would have to be passed by a state legislature, and by the use of the term "as near as practicable" it meant as nearly as was practicable by the use of legislative machinery.

The question which we have in mind was never presented with more clearness than by Mr. Justice Peckham of the Court of Appeals of New York, October 13, 1892, in the case of *People ex rel Carter v. Rice, Secretary of State*, 135 N. Y. 473, at page 498, 31 N. E. 921, at page 929.

There was involved in that case a state legislative apportionment act, and this distinguished jurist used the following language:

> "This renders the mathematical process impossible, both as regards senate districts and the apportionment of members of assembly. We start, then, with the proposition that to the legislature is intrusted some discretion in the matter of apportionment. Is the court to interfere with such power whenever it thinks that the legislature might possibly have come nearer to an equality, after complying with the special conditions mentioned in the constitution? This would be to assert a power in the court to supervise the exercise of the discretion granted to the legislature, if such

discretion were exercised in the slightest degree after the constitutional mandate in regard to county lines and county members had been complied with. We do not believe in the propriety or necessity of any such rule. On the contrary, we think that the courts have no power in such case to review the exercise of a discretion intrusted to the legislature by the constitution, unless it is plainly and grossly abused. The expression 'as nearly as may be', when used in the constitution with reference to this subject, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment shall be made. The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in actual practice must depend, generally, upon the integrity of the legislature. We do not intimate that in no case could the action of the legislature be reviewed by the courts. Cases may easily be imagined where the action of that body would be so gross a violation of the constitution that it could be seen that it had been entirely lost sight of, and an intentional disregard of its commands, both in the letter and in the spirit had been indulged in.

"In the report made to the Senate of the United States in April, 1832, by a committee of that body, of which Mr. Webster was chairman, it was stated that the words of the Federal Constitution were equivalent upon this subject to a direction to apportion the representatives among the states upon the basis of population, as nearly as may be. 3 Webst. Misc. Works, 369. It was then stated that the process theretofore adopted

by Congress was unconstitutional, and that the true process was a mathematical one, which the report set forth. It was not then adopted by Congress, which adhered to its old method. There is no intimation in the report that the action of Congress, although what was termed unconstitutional, was subject to the revision of the courts. No such remedy was ever suggested. Congress has since that time adopted the theory of the report, and made a mathematical problem of the subject, and referred it to the Secretary of the Interior to carry out its instructions on the basis of arithmetic.

"In this case mathematics cannot enter into the whole problem, because of the constitutional obligation as to county lines and county representation, and hence the sole question now is whether the legislative discretion has been so far abused as to render the act liable to an overthrow by the courts. This brings us to an examination of the act itself. It can be stated at the outset, that, although the fairest that has been passed upon the subject, the act is not an absolutely ideal one. *There are some inequalities which any one individual intrusted with the power might at once remedy, but which might be very hard to alter when brought under the review of* 128 *Assemblymen and* 32 *Senators. Local pride, commercial jealousy and rivalries, diverse interests among the people, together with a difference of views as to the true interests of the localities to be affected, all these things and many others might have weight among the representatives upon the question of apportionment, so that, in order to accomplish any result at all, compromise and conciliation would have to be exercised. Looking at*

the act as a result of such circumstances, and it seems clear that it cannot be said to be so far a violation of legislative discretion as to cause its complete overthrow by the courts."

So, we submit with respect to the Mississippi redistricting act, under review, the question is a Congressional-political question. Congress has treated its act as merely directory, and has left the question as an administrative matter to the states.

Adopting the reasoning of Mr. Justice Peckham, the act cannot be said to be an abuse of legislative discretion. As a matter of fact the legislative redistricting act under review is the most compact, contiguous act that the State of Mississippi ever had since the members of the House of Representatives have been elected by districts. A map of the Congressional districts, provided in the act under review, will reflect that they are doubtless approximately equal as to number of qualified electors. The Seventh District has a smaller population than the Third District. The Third District has a population of 420,069. The Seventh has a population of 416,301. The Seventh District has fewer native whites than the Sixth. The Sixth District has 198,832 native whites, while the Seventh has 174,597. The new Seventh District has less area than has been included in the Sixth District for thirty years. The new Seventh District has fewer counties than the Sixth. The new Seventh District is the most compact district in the state.

Under the recent act, the inequalities in population are

not greater than under previous redistricting acts in proportion to the population. As a matter of fact, the Legislature of the State of Mississippi, in 1932, practically returned to the redistricting act of 1880, under which act, with a total population in the state of 1,131,000, the districts varied from 125,860 in the Sixth District to 195,735 in the Fourth District, so that the inequalities following the census of 1880 were really greater than are to be found in the present bill.

The redistricting bill, passed by the Legislature of the State of Mississippi, in 1902, following the census of 1900, reflects the same inequalities. There were doubtless commercial and ethnological reasons for the present redistricting bill. The Third District, which is the largest district in the state, comprises what is known as the "Delta Section" of Mississippi, a part of Mississippi which is distinctive in soil, industry, etc., from every other part of the state.

The Sixth District represents the sea-coast, and the Long Leaf Yellow Pine Section of the state, and represents a different class of people, industries, etc.

The First District represents the prairie section of the state.

The new Seventh District represents the South-west portion of Mississippi, composed of homogeneous people, with congenial pursuits and industries.

We call Your Honors' attention to the language used

by the Supreme Court of the State of Mississippi, in the case of *Wood, Secretary of State v. State*, ex rel, 142 So. 747, at page 752. The Court used the following language:

> "For nearly one hundred years it has been the settled policy and practice to select Representatives in Congress from districts, and this has grown as a necessity out of the obvious fact that the different sections of the state have their own particular and peculiar interests and needs in national legislation and in national aid. This is strikingly illustrated in our own state by the Delta district wherein the paramount interest and need is in flood protection and in river matters, whereas the people in the north eastern district of the state have no immediate interest in those problems, except as all people in the entire nation are interested therein. * * * *
>
> "No complaint is urged against the redistricting act on account of contiguity or compactness, but the attack is because of inequality of inhabitants. It is shown that the districts in that respect are as follows: First District, 214,705; Second District, 219,661; Third District, 402,969; Fourth District, 184,266; Fifth District, 244,562; Sixth District, 284,547; Seventh District, 414,301. It is apparent upon the face of the stated figures that there is an inequality of inhabitants; but there has been an inequality in this respect in every congressional districting act that has been passed in this state, going back even to the beginning. And this has not been the case only in this state, but has prevailed in nearly all the states. * * These facts show that the matter of equality of inhabitants has by long and general practice been regarded both by the states and by Congress as a

subordinate or secondary question, and that the paramount and controlling consideration has been to create districts in which homegeneity in national interest and needs shall be preserved, rather than to be bound by a strict judicial rule of equality in number of inhabitants.

"We are not confronted here with a situation wherein there has been a mere pretense towards the creation of congressional districts, as would be the case for instance, if the Legislature had taken only one of two counties, or even three and made one congressional district of them, and so on for six districts, and had then placed the remainder of some fifty or sixty counties into a seventh district. This would be so far a mere pretense and fraud as to demonstrate that the paramount requirement of districts as substantial and homogeneous units had been utterly flouted and subverted. But here there has been the substantial creation of fairly compact and homogeneous districts, and while we regret the inequality of population, we must in approaching this question do so as judges, and not as legislators, nor as individuals, and in doing so we must broadly look to the whole state and to all its parts and sections and to the ultimate interests of all the people of the state who in the vast majority have had no direct part in, or connection with, this particular piece of legislation. We are thus confronted with the plain and obtrusive question whether by a mandate from this court, if such a mandate could be made effective, the districts and the district interests shall be allowed to be destroyed, the dominant practice and policy of nearly a century's duration shall be reversed, and in lieu thereof the Representatives shall be elected from the state at large

without regard to districts or the interests of the people of the state in the preservation of district representation."

Respectfully submitted.

GREEK L. RICE, Attorney General, and

J. A. LAUDERDALE, Assistant Attorney General

WILLIAM H. WATKINS,

Attorneys for Appellants.

APPENDIX A

DISSENTING OPINION BY JUDGE HOLMES

The final decree in this case is broad in terms and far-reaching in effect. It expressly declares void an entire act of the Legislature and perpetually enjoins the Governor, as well as all subordinate officers, from executing its provisions. It indirectly strikes at nominations by political parties, although it was stated in open court that no interference with party primaries was asked by the plaintiff; but I shall not dwell upon this seemingly apparent error in the decree, as the objections to it are more deeply rooted. However, see Section 5870 and 5900 Miss. Code of 1930; *Newverry vs. United States*, 256 U. S. 232.

It was conceded at the hearing, and the court judicially knows, that the elections sought to be regulated are regular ones provided by law to choose officers, both state and federal, in addition to representatives in Congress, and that the expense of adding the names of congressional candidates to the ballot is too trifling for this or any court to consider. It was further conceded at the bar that the right of the plaintiff to be a candidate for office was not a sufficient legal basis for the issuance of an injunction.

Reliance for jurisdiction in this court is had solely upon Sec. 24, Par. 14, of the Judicial Code. Regardless of the amount in controversy, this paragraph gives the court jurisdiction of "all suits at law or in equity authorized by law to be brought by any person to redress the deprivation,

under color of any law, * * * of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

It is not conceivable that Congress intended by this paragraph to change the well settled rule that a court of equity is concerned only with matters of property and the maintenance of civil rights. The grant of jurisdiction of "suits at law or in equity authorized by law to be brought" signifies an intention to preserve, and not to obliterate, the historical distinctions between law and equity embedded in the federal constitution, and recognized in federal jurispudence from the national government's birth to the present time. This court has no jurisdiction in matters of a political nature, except when necessary to the protection of rights of property. "Neither the legislative nor executive department," said Chief Justice Chase, "can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Mississippi v. Johnson,* 4 Wall 475. "The office and jurisdiction of a court of equity," said Mr. Justice Gray, "unless enlarged by express statute, are limited to the protection of rights of property." *In re Sawyer,* 124 U. S. 200. Mr Chief Justice Fuller, on circuit, quoting the preceding excerpts and citing the other cases, added: "To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government or of the courts of common law."

Green v. Mills, 69 Fed. 852. See, also, *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909; *Brumfield v. Brock*, 142 So. 745; Pomeroy's Equity Jurisprudence, Vol. 4, (14 ed.) Sec. 1753.

Questions of equitable jurisdiction and procedure aside, the claim in this case is lacking in matter of substantial federal right. The crux of plaintiff's contention is that the right to vote implies the right to vote in a legal election where his ballot will count for as much, relatively, as the ballot of any other elector, and that Mississippi's recent redistricting act, by inequality in number of inhabitants, lessens the weight of his vote in comparison with the vote of electors in other congressional districts with fewer inhabitants. No denial of the right to vote or hold office is asserted. No property or civil right is denied or threatened. The federal implied right, which is asserted, is that the vote of every person in the seventh district shall be of equal weight or power with the vote of every elector in other districts.

With deference, it is thought that the conclusion of the court is predicated upon a false major premise. The equal protection clause of the fourteenth amendment is inapplicable. No statutory or constitutional provision gives any elector the right to vote in a district numerically equal in inhabitants to every other congressional district. Mathematical equality is not required. Numerically exact limits are not fixed, either in the constitution or by act of Congress. The widest discretion has been exercised by the legislatures, under the present and previous apportionments, without congressional interference. Under the one of 1930, there are many states with unequal districts, as to

the number of inhabitants. The State of Alabama has one with 250,000 inhabitants, and another with 450,000; California one with 165,000 and another with 350,000; Michigan one with 225,000 and another with 400,000; Ohio one with 168,281, another with 633,678; Pennsylvania one with 125,322, another with 445,109; South Dakota one with 200,000, another with 650,000; Tennessee one with 195,000, another with 380,000. If, as plaintiff claims, he has a federal right to a balancing vote throughout the United States, it is apparent that this Court can grant him no effective relief. For this reason, the Constitution gave plenary powers to regulate the subject to the Legislature of each state and to the Congress.

There is also a wide gulf between the facts alleged and the rights asserted. The bill relies upon the number of inhabitants in each district; nothing is said about the number of qualified electors. This is natural because the basis of representation in the Congress is apportioned by the Constitution in accordance with the number of inhabitants in each state. It is well known that in many of the states, including this one, residence is not the sole qualification of an elector. The proportion of electors to inhabitants is a factual relation, depending upon varying conditions, of which a court cannot take judicial knowledge. Notwithstanding the excessive number of inhabitants, the plaintiff's vote, under his theory, may outweigh the vote of electors in other districts with fewer inhabitants. It is a non-sequitur, to conclude that the number of qualified electors in each district is in equal proportion to the number of inhabitants. If then the asserted right existed in the abstract, no facts are shown which would give play to the exercise of it.

The objections to the decree are still more serious. To issue an injunction to restrain the holding of an election, or directing the mode in which it should be held, has ever been regarded by profound constitutional writers as an interference with a free expression of opinion, and an unwarranted obstruction to the freedom of elections, which, if successful, would be fraught with danger to our republican institutions. The mere effort to assume such a power is suggestive of a tendency to render the people and the officers subservient to the courts, in matters of civil polity and endangers our dual form of state and national government, each with its separate and independent departments.

The relief asked should be denied, not that the redistricting act is deemed wise, or that all of the regulations prescribed by Congress have been fairly met, but because, under the distribution of powers in the federal constitution, the judicial department is not the guardian of the rights of the people in respect to the times, places and manner of holding elections for Representatives in the Congress. The Constitution says these things "shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." If a primary object of the act is evinced by the mandate that "the Representatives to Congress shall be elected by districts composed of contiguous and compact territory," each with only one representative, such object should not be wholly defeated because the Legislature may have abused its discretion with reference to a standard which is plainly directory, as shown by the use of the words, "as nearly as practicable." The discretion was not given to the judiciary. A court can only

efface the districts, but Congress may alter the boundaries, or regulate more in detail the number of inhabitants, if not retroactively, at least prospectively.

The rule is well settled that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute. Judge Cooley says:

> "The protection aginst unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people in their soverign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinion upon points or right, reason and expediency with the law-making power. Any legislative act which does not encroach upon the power apportioned to the other departments, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

If it be contended that, as a citizen or an elector of the State, the plaintiff has a federal right to insist upon a compliance by the Legislature with the Congressional reapportionment act, it becomes readily apparent that in either capacity he has sustained no injury which has not been suffered by the people or the electorate at large. If any wrong has been done by the Legislature, it is a public, political wrong, from which no special injury has resulted,

or is impendent to the plaintiff, and for which equity will grant no injunctive relief.

In conclusion, I am constrained to dissent from the action of the majority of the court, because I regard the issuance of the injunction in this case as an unwarranted encroachment by the federal court upon the legislative discretion of a sovereign state, the necessary effect of which is to substitute the judgment of the court for that of the Legislature, in a matter where the Federal constitution has granted an exclusive discretion, primarily to the Legislature of each state and ultimately to the Congress of the United States. Operating in this instance directly upon the primary function of the Legislature, if successful, the injunction portends the possibility of a like encroachment upon the ultimate, or a similar, function granted to the Congress by the Constitution of the United States.

APPENDIX "B"

POPULATION OF CONGRESSIONAL DISTRICTS OF MISSISSIPPI, AS CREATED BY CHAPTER 61, LAWS OF MISSISSIPPI 1902, AND HOUSE BILL 197 LAWS OF 1932.

	CENSUS 1900 LAWS 1902	CENSUS 1930 LAWS 1932
FIRST DISTRICT	187,739	223,674
SECOND DISTRICT	183,825	201,911
THIRD DISTRICT	232,174	420,969
FOURTH DISTRICT	199,650	198,708
FIFTH DISTRICT	183,066	244,904
SIXTH DISTRICT	162,440	305,354
SEVENTH DISTRICT	211,521	414,301

OCT 24 1932

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE, ET AL.,
APPELLANTS,

vs.

S. C. BROOM, APPELLEE.

Congressional Report, Davison vs. Gilbert.

APPENDIX 1 OF APPELLANTS' BRIEF.

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APPENDIX A.

HOUSE OF REPRESENTATIVES.

56th Congress, 2nd Session. — Report No. 3000.

Congress sustained this report.

DAVISION VS. GILBERT.

March 1, 1901.—Ordered to be printed.

Mr. TAYLER, of Ohio, from the Committeee on Elections No. 1, submitted the following

REPORT.

(To accompany H. Res. 443.)

The Committee on Elections No. 1, to whom was referred the contested-election case of George M. Davison v. George G. Gilbert, from the Eighth district of Kentucky, make the following report:

The contestee was elected, as shown by the official returns, by a plurality of 841.

The claim of the contestant chiefly rests upon the fact that on March 11, 1898, an act was passed by the legislature changing the boundaries of the Eighth and Eleventh Congressional districts of Kentucky, whereby the county of Jackson was taken from the Eighth District and added to the Eleventh. Jackson County having a large Republican majority, the effect of its transfer to the Eleventh was to change the Eighth from a district which had immediately previously been Republican into a Democratic district.

As respects this act, the contestant claimed three things:

First, that it was contrary to the constitution of the State of Kentucky;

Second, that it was never properly passed by the legislature in the manner required by the Kentucky constitution;

Third, that it was contrary to the act of Congress apportioning Representatives among the States.

As to the first two propositions your committee has no difficulty in arriving at the conclusion that the act of March 11, 1898, was not in contravention of the Kentucky constitution, and that it was, as far as we have authority to inquire, properly passed by the legislature.

The third proposition, namely, that it contravenes the act of Congress, is more serious, and requires more careful consideration.

The Federal Constitution, Article I, section 4, paragraph 1, is as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of Choosing Senators.

This provision of the Constitution has been very much discussed; first, as to the scope of the power granted to Congress respecting the manner of holding Congressional elections; and, second, as to the expediency of the exercise of such power where it was sought to be exercised, if possessed, for the purpose of controlling the division of a State into Congressional districts.

It is believed that this is the first time in the history of the Government when Congress has been called upon to undo the work of a State which had divided itself into the proper number of Congressional districts.

When the Constitution was under consideration by the various States several of them opposed the unqualified acceptance of the provision above quoted, on the express ground that the clause was liable to misconstruction and that under its terms Congress might at some time seek to divide the States into districts,

and in several States the ratifying body accepted the Constitution on condition that effort should be made to change the phraseology so as to put this matter beyond dispute. For nearly forty years the States proceeded to elect Representatives, some at large and some by districts. In 1840 the policy of electing by districts was generally approved and adopted, but several of the States continued to elect their Representatives by the vote of the entire State. The first legislation on the subject going beyond the mere apportionment of the States was enacted in 1842. In the apportionment act of that year an amendment was added in the House providing for the division of the several States into districts, composed of contiguous territory, equal in number to the number of Representatives to which the State was entitled, and each district to elect one Representative and no more.

The amendment provoked considerable discussion, but was finally adopted.

The apportionment act based upon the census of 1850 made no provision for the division of States into districts, nor did the act of 1862. The act of February 2, 1872, provided that Representatives should be elected by districts composed of contiguous territory, and added the provision "containing, as nearly as practicable, an equal number of inhabitants." The same provision appears in the apportionment acts of 1882 and 1891.

So far as legislative declaration is concerned, it is apparent that Congress has expressed an opinion in favor of its power to require that the States shall be divided into districts composed of contiguous territory, and of as nearly equal population as practicable. Whether it has the constitutional right to enact such legislation is a very serious question, and the uniform current of opinion is that if it has such power under the Constitution, that power ought never to be exercised to the extent of declaring a right to divide the

State into Congressional districts, or to supervise or change any districting which the State may provide.

The best opinion seems to be that the Constitution does not mean that under all circumstances Congress shall have power to divide the States into districts, but only that the constitutional provision was inserted for the purpose of giving Congress the power to provide the means whereby a State should be represented in Congress when the State itself, for some reason, has failed or refused to make such provision itself.

Justice Story, in his commentaries on the Constitution, says:

> In answer to all such reasoning it was urged that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain within itself the means of its own preservation. A discretionary power over elections must be vested somewhere. There seems to be but three ways in which it could be reasonably organized. It might be lodged either wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted in the first instance to the local government, which in ordinary cases, and when no improper views prevail, may both conveniently and satisfactorily be by them exercised; but in extraordinary circumstances the power is reserved to the National Government, so that it may not be abused, and thus hazard the safety and permanency of the Union.

He adds: "It is not too much, therefore, to presume that it will not be resorted to by Congress until there

has been some extraordinary abuse or danger in leaving it to the discretion of the States respectively."

Hamilton, in the Federalist, makes this, among other comments, on the subject:

> Nothing can be more evident that that an exclusive power of regulating elections for the National Government in the hands of the State legislatures would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.

Madison expressed the same views in the Virginia convention with great force, and expressed the opinion that if the elections were exclusively under the control of the State government the General Government might easily be dissolved.

Chancellor Kent, in his Commentaries, says:

> The legislature of each State prescribes the times, places, and manner of holding elections, subject, however, to the interference and control of Congress, which has permitted them for the sake of their own preservation, and which it is to be presumed they will never be disposed to exercise except when any State shall neglect or refuse to make adequate provision for the purpose.

In the Twenty-second Congress, first session, an elaborate report was presented by Mr. Webster on the subject of apportionment. In the course of this exhaustive statement he discusses the very question which is here involved. The following extract is fairly representative of the rest of the report on that phase of the question:

> Whether the subdivision of the representative power within any State, if there be a subdivision, be equal or unequal, or fairly or unfairly made, Congress can not know and has no authority to inquire. It is enough that the State presents her own representation on the floor of Congress in the mode she chooses to present it. If a State were to give to one portion of her territory a representative for every 25,000 persons, and to the rest a representative only for every 50,000, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in Congress, because the Constitution has left all this to the State itself.

These are the guarded words of a great commentator on the Constitution, uninfluenced by any bias or special motive, except to justly interpret its provisions.

A remarkable and convincing speech is that made in the 27th Congress by Nathan Clifford, then a Representative from Maine and afterwards a justice of the Supreme Court of the United States. Mr. Clifford argued with great cogency against the theory that Congress had any such power as the act of 1842 undertook to express, and in our opinion those arguments have never been satisfactorily answered.

And, indeed, the force which the proposition contended for by the contestant in this case possesses is derived chiefly from the fact that, without objection for the last three decades, Congress has legislated as though no question was made as to its power over the division of States into districts. If the act of 1842, in which we find the first Congressional expression of power, had sought by its terms to define the geographical boundaries of every Congressional district in the several States it could not by any possibility

have been adopted. So far as we have been able to learn, no friend of the amendment to that act contended that Congress had any such power. The construction of Madison, Story, and Kent seems most reasonable and natural.

Your committee are therefore of opinion that a proper construction of the Constitution does not warrant the conclusion that by that instrument Congress is clothed with power to determine the boundaries of Congressional districts, or to revise the acts of a State legislature in fixing such boundaries; and your committee is further of opinion that even if such power is to be implied from the language of the Constitution, it would be in the last degree unwise and intolerable that it should exercise it. To do so would be to put into the hands of Congress the ability to disfranchise, in effect, a large body of the electors. It would give Congress the power to apply to all the States, in favor of one party, a general system of gerrymandering. It is true that the same method is to a large degree resorted to by the several States, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results.

Your committee therefore recommends the adoption of the following resolutions:

Resolved, That George M. Davison was not elected a Representative to the Fifty-sixth Congress from the Eighth District of Kentucky, and is not entitled to a seat therein.

Resolved, That George G. Gilbert was elected a Representative to the Fifty-sixth Congress from the Eighth District of Kentucky, and is entitled to retain his seat therein.